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SECURITY INTERESTS

Current activities and possible future work

Report of the Secretary-General

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I. INTRODUCTION

1. At the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", held in New York in conjunction with the twenty-fifth session of the Commission in May 1992, a number of proposals were made for future work by the Commission.[1] Since 1992, the Commission has implemented several of those proposals, having prepared the UNCITRAL Notes on Organizing Arbitral Proceedings, the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL draft Convention on Assignment of Receivables and the UNCITRAL draft Guide on Privately Financed Infrastructure Projects. In addition, the Commission considered other proposals, such as the proposal to prepare a legal guide on privatization contracts, on which it decided not to undertake any work,[2] and the proposal to monitor implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which the Commission is in the process of implementing.[3]

2. One of the proposals made at the UNCITRAL Congress, which the Commission has not had the chance to consider, was the suggestion for the Commission to resume its earlier work on security interests.[4] The matter has been reiterated in conferences all over the world over the last few years and has attracted the attention of legislators at the international, regional and national level, and of international and regional financial institutions, such as the European Bank for Reconstruction and Development, the International Bank for Reconstruction and Development and the Asian Development Bank (see paras. 15-18). With a view to informing the Commission about current activities in the field of security interests, facilitating coordination of efforts and assisting the Commission in its consideration of the matter, this special current activities report is intended to discuss briefly the earlier work of the Commission on security interests and developments in the area of security interests law in the last twenty-five years, identifying trends and problems, and to make suggestions as to possible areas for future work.

3. The very existence of widespread developments, both at the national and international level (see paras. 4-36), suggests greater acceptance than in the past of the central nature of this body of law to the functioning of modern credit economies. Moreover, these developments have moved the nations of the world, however slightly, toward a greater state of harmony. For both of these reasons, the present report, along with the report

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1/ Uniform Commercial Law in the Twenty-first Century, Proceedings of the Congress of the United Nations Commission on International Trade Law, New York 18-22 May, United Nations, New York, 1995, 268-274.

2/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), para. 310.

3/ Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 331 and 332.

4/ Congress Proceedings, 159 and 271.

of the Working Group on Insolvency Law (see A/CN.9/469), may lead the Commission to consider with greater optimism than would have been possible in the past the possibility of further efforts in the area of secured credit.

II. RECENT INITIATIVES

A. Governmental level

1. UNCITRAL

4. Secured transactions law has been on UNCITRAL's agenda since its inception.[5] With its pioneering work in the late 80's, UNCITRAL set the stage for unification and harmonization efforts in the field of secured transactions law.[6] These studies led to the suggestion by the Secretariat that the preparation of a model law would be both desirable and feasible.[7] At its thirteenth session in 1980, the Commission considered a note by the Secretariat, which discussed issues to be considered and made suggestions as to possible solutions.[8]

5. However, at that session, the Commission concluded "that world-wide unification of the law of security interests in goods ... was in all likelihood unattainable". The Commission was led to that conclusion because it was concerned that the subject was too complex and the divergences among the different legal systems too

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5/ Report of the Commission on the work of its first session in 1968, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), paras. 40-48 and Report of the Commission on the work of its second session in 1969, ibid., Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 139- 145.

6/ The documents prepared in the context of UNCITRAL's work on security interests became common points of reference. Those documents are: A/CN.9/102, Security interests in goods, discussed in Report of the Commission on the work of its eighth session in 1975, ibid., Thirtieth Session, Supplement No. 17 (A/10017), paras. 47-63; A/CN.9/130, A/CN.9/131 and annex, Study on security interests and legal principles governing security interests (study prepared by Prof. Ulrich Drobnig of Germany) and A/CN.9/132, Article 9 of the Uniform Commercial Code of the United States of America, discussed in Report of the Commission on the work of its tenth session in1977, ibid., Thirty-second Session, Supplement No. 17 (A/32/17), para. 37 and Report of the Committee of the Whole II, paras. 9-16; A/CN.9/165, Security interests; feasibility of uniform rules to be used in the financing of trade, discussed in Report of the Commission on the work of its twelfth session in 1979, ibid., Thirty-fourth Session, Supplement No. 17 (A/34/17), paras. 49-54; and A/CN.9/186, Security interests, issues to be considered in the preparation of uniform rules, discussed in Report of the Commission on the work of its thirteenth session in 1980, ibid., Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 23-28.

7/ See A/CN.9/165, para. 61.

8/ Formal requirements for the creation of a security interest, actions required for the security interest to be effective as against third parties, priority issues, proceeds and remedies in the case of default (see A/CN.9/186).

many, as well as that it would require unification or harmonization of other areas of law, such as insolvency law. During the discussion at that session, it was noted that it was advisable for the Commission to await the outcome of the work on the retention of title by the Council of Europe and on factoring by the International Institute for the Unification of Private Law (Unidroit), prior to the Commission undertaking any further work of its own.[9]

6. After completion of Unidroit's work on factoring (see para. 7; the work of the Council of Europe on retention of title was never completed; see para. 10) and pursuant to suggestions made at the UNCITRAL Congress in 1992 (see para. 1), the Commission resumed its earlier work on secured transactions but only with regard to assignments of receivables in an international context.[10] The Commission is expected to review and finalize a draft Convention on Assignment of Receivables at its thirty-third session.[11] The draft Convention will cover traditional financing transactions, such as lending against sums owed for goods sold or leased, intellectual property licensed or services rendered. It will also cover sectors of secured financing which are of growing importance, such as securitization. The draft Convention would apply if the assignment or the receivable is international and the assignor (and, for the application of certain provisions, the debtor) is located in a Contracting State.[12]

2. International Institute for the Unification of Private Law

7. In 1988, Unidroit finalized two Conventions, one on International Financial Leasing and another on International Factoring ("the Ottawa Conventions"). Factoring and leasing are conceptually similar to secured lending. Factoring is a form of financing the operations of a business by converting its receivables to cash, a

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9/ Ibid., paras. 26-28.

10/ From its twenty-sixth session in 1993 to its twenty-eighth session in 1995, the Commission considered three notes by the Secretariat (A/CN.9/378/Add.3, discussed in Report of the Commission on the work of its twenty-sixth session in 1993, ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; A/CN.9/397, discussed in discussed in Report of the Commission on the work of its twenty-seventh session in 1994, ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and A/CN.9/412, discussed in Report of the Commission on the work of its twenty-eighth session in 1995, ibid., Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381). At its twenty-eighth session in 1995, the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing (ibid., para. 379). The Working Group commenced its work at its twenty-fourth session in November 1995, by considering a report of the Secretary-General (A/CN.9/412). From its twenty-fifth session in 1995 to its thirty-first session in 1999, the Working Group considered revised draft articles prepared by the Secretariat (A/CN.9/WG.II/WP.87, A/CN.9/WG.II/WP.89, A/CN.9/WG.II/WP.93, A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.102 and A/CN.9/WG.II/WP.104), and, from its twenty-ninth to thirty-first sessions, it adopted a draft Convention on Assignment of Receivables (see A/CN.9/455, para. 17 and A/CN.9/456, para. 18; and A/CN.9/466, para. 19).

11/ See A/CN.9/466, para. 215.

12/ An article-by-article commentary on the draft Convention is contained in A/CN.9/470.

feature that this method of financing shares with lending against those receivables as security. In a lease, especially one conceived for financing purposes, the lessor's right to terminate the lease and regain possession of the leased goods also relates to secured lending. While the Ottawa Conventions are in force, they address primarily the contractual aspects rather than the proprietary security interests aspects of factoring and leasing.[13]

8. In1993, Unidroit announced its intention to prepare in due course a model law on secured transactions.[14] In 1994, three papers were published (i.e. preliminary considerations, an outline of a modern legal regime in the field of secured transactions and comments by the EBRD).[15] In 1995, a report was published about a meeting of international organizations involved in the preparation of legislation in the field of security interest law, which was held in Rome on 29 November 1994.[16] No further action has been reported on this matter since that time. The matter does not appear on the list of priority topics of the Unidroit Work Programme for the triennium 1999-2001, as approved by the General Assembly of Unidroit at its 52nd session, held in Rome on 27 November 1998.[17]

9. Unidroit is currently preparing, in cooperation with other organizations, a preliminary draft Convention on International Interests in Mobile Equipment ("the preliminary draft Convention") and Protocols on aircraft ("the preliminary draft Aircraft Protocol"), space equipment and railway rolling stock. Further protocols may be prepared in the future for other types of high-value mobile equipment. The draft Convention and Protocols are intended to create a new security interest in certain types of highly mobile, high-value equipment, such as aircraft, space equipment and railway rolling stock. The security interest is, for the most part, as comprehensive as the security interest under Article 9 of the United States Uniform Commercial Code ("UCC Article 9"), since it comprises, in addition to security interests proper, reservations of title and leases. Furthermore, while the security interest to be established is called "international", there is no need for it to be connected to more than one State and, if registered under the preliminary draft Convention, will, in the case of conflict, prevail over a purely national interest. At its session in 2000, the Unidroit Governing Council authorized the Unidroit secretariat to make the necessary arrangements for the holding of a diplomatic conference early in 2001 to finalize and adopt the preliminary draft Convention and Aircraft Protocol.

13/ The Convention on International Financial Leasing has been ratified or acceded to by eight States and the Convention on International Factoring has been ratified or acceded to by six States (for the status of those texts, see http://www.unidroit.org).

14/ Unidroit 1993, C.D. 72 (18).

15/ Unidroit 1994, Study LXXIIA - Doc. 1, 2 and 3, October-November 1994.

16/ Unidroit 1995, Study LXXIIB - Doc. 1, March 1995.

17/ High priority was assigned to the preparation of a preliminary draft Convention on International Interests in Mobile Equipment and Protocols on certain types of such equipment, the second edition of the Unidroit Principles of International Commercial Contracts, a model law on franchising, transnational rules of civil procedure (in cooperation with the American Law Institute), a model law on leasing and uniform rules applicable to transport (see Unidroit Work Programme for the 1999-2001 triennium in http://www.unidroit.org).

3. Council of Europe and European Union

10. Retention of title has been the object of two attempts at unification on the European level. In 1982, the Council of Europe's Committee on Legal Cooperation ("CDCJ"), on the basis of a thorough comparative study, prepared a draft Convention on retention of title.[18] However, the draft was not finalized by the Committee since several member countries apparently were planning reforms in this field. Work was adjourned indefinitely in 1986 (on retention of title, see also para. 19).[19] In 1997 and 1998, the Commission of the European Union published two versions of a draft Directive on Delays of Payment. Article 4 of this draft contained some rules on retention of title. However, a revised draft published in 1999 does not contain that provision.

11. In order to facilitate the efficient and cost effective operation of cross-border payment and securities settlement systems, the European Union, in 1998, issued a Directive on Settlement Finality in Payment and Securities Settlement Systems (Directive 98/26/EC of 19 May 1998). The Directive enhances certainty, at least with regard to the law governing the proprietary effect of a collateral arrangement which is subjected to the law of the Member State where the relevant register, account or centralized deposit system is located (article 9 (2)). In addition, with a view to harmonizing the law on security interests in investment securities, the Commission of the European Union published in June 1998 a so called "Framework for Action". The document was approved and was given high priority by the European Council summits at Cardiff and Vienna. In May 1999, the Commission published a document called "Financial Services Action Plan". The document was prepared by a Financial Services Policy Group constituted by the Commission and entrusted with the task of transforming into action the "Framework for Action". In the autumn of 1999, the Internal Market Directorate General, Financial Services of the Commission of the European Union established a Group on Collateral Law. The Group, which was composed of experts nominated by European organizations with wide experience, as well as sectoral and geographical expertise, held its second meeting in December 1999.[20]

12. The purpose of this project is to set the ground for the preparation of a Directive on a European Financial Security Interest ("EFSI") and a European Title Transfer ("ETT") relating to investment securities by the end of the year. The proposed regime would not change the nature of the asset given as security ("collateral") and the interest in securities under national law but would create a new security interest in investment securities. The regime would apply to collateral takers and collateral providers within the European Union and would extend across the whole range of commercial entities. For the creation of an EFSI or for an ETT, a written agreement

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18/ CDCJ, (82) 15.

19/ CDCJ (83) 36, paras. 20-25.

20/ The group took into account work carried out by other groups (e.g. the discussion paper "Modernizing Securities Ownership, Transfer and Pledging Laws", published by the International Bar Association in February 1996, the Report of the Giovannini Group "EU Repo Markets: Opportunities for change", published by the European Union in October 1999 and the Report "Collateral Arrangements in the European Financial Markets-The Need for National Law Reform", published in December 1999 by the International Swaps and Derivatives Association (ISDA). For information on ISDA and its work, see ISDA's website (http://www.isda.org).

signed by the parties (or by an agreement recorded and signed in electronic form) would be required. For the perfection of an EFSI or of an ETT, notification of the intermediary holding the interest for the collateral provider and entry into the books of the intermediary would be necessary. The collateral taker would be allowed to "use" (i.e. sell, lend, repurchase or pledge) the collateral, with the consent of the collateral provider, up until the time it is to be returned to the collateral provider. Upon default of the collateral provider, the collateral taker should be able to liquidate the collateral speedily, with the minimum formalities and without any assistance from or interference by courts or insolvency administrators. The legal regime envisaged would also deal with private international law issues. The law governing the collateral contract would be the law chosen by the parties. The law governing effects as against third parties, in line with article 9 (2) of the Directive on Settlement Finality, should be the law of the location of the intermediary on whose books the collateral taker's interest is recorded.

4. Organization of American States

13. The Organization of American States (OAS) has recently begun work toward a model inter-American law governing secured transactions. At the request of the Secretariat of OAS, the National Law Center for Inter-American Free Trade (NLCIFT) has prepared several studies on secured transactions law and a draft model law which is inspired by UCC Article 9 and the Canadian Personal Property Security Acts ("PPSA's"). A meeting of governmental experts, held in Washington, D.C. from 14-18 February 2000, considered a number of papers, including a set of principles governing a system of secured transactions.[21] Such principles include: the creation of a unitary, uniform security interest; the automatic extension of the original security interest in property acquired after the creation of the security interest and to proceeds from the sale of collateral; the special treatment of the interest of a creditor providing the funds for the purchase of goods that may be subject to security interests of other creditors; the special treatment of the interest of a buyer of collateral in the course of business; swift repossession or adjudication of the issue of possession of the collateral and private disposition of the collateral; and notice-filing (voluntary registration of a limited number of data). At that meeting, it was decided that a drafting group should be established to prepare the final version of the draft model law by the end of 2000.[22]

5. Organisation pour l'Harmonisation en Afrique du Droit des Affairs

14. The Organisation pour l'Harmonisation en Afrique du Droit des Affairs (OHADA), an international organization of twelve Francophone and two non-Francophone sub-Saharan African States, has recently been created for the purpose of unifying the business law of its Member States and creating a secure, business-friendly legal and economic environment in sub-Saharan Africa. In 1997, it adopted a Uniform Act on Security Rights which is based essentially on French law, but includes certain novel provisions. In particular, the French rules on non-possessory pledge have been integrated into the Act, although the various types of tangible collateral and some intangibles are still governed by separate rules. While the OHADA Uniform Act creates a single register, it does not contain rules governing the cross-border movement of tangible collateral among the Member States.

21/ OEA/Ser.K/XXI, REG/CIDIP-VI/INF.3/00 and OEA/Ser.K/XXI, REG/CIDIP-VI/INF.2/00 of 14 February 2000.

22/ OEA/Ser.K/XXI, REG/CIDIP-VI/doc.6/00 of 18 February 2000, part III (conclusions and recommendations).

6. European Bank for Reconstruction and Development

15. A Model Law on Secured Transactions was elaborated by the European Bank for Reconstruction and Development (EBRD) and published in 1994. Its primary purpose was to assist the former socialist countries in Eastern Europe in the development of modern legislation on security interests in movables. One of the guiding principles for the preparation of the Model Law was compatibility with the civil law tradition of the Central and Eastern European States it was prepared for. The Model Law creates a single security right in respect of all types of asset available as collateral, including future assets and a changing pool of assets, such as inventory. The security right may be a registered right, a right of an unpaid seller or a possessory right. For the creation of all those rights, a written document is required. Priority is mainly determined in accordance with the time at which a right was created (i.e. in the case of a registered right, the time of registration; in the case of an unpaid seller's right, the time at which title is transferred; and, in the case of a possessory right, the later of the time mentioned in the written document and the delivery of possession). The Model Law has had a considerable impact on recent legislation, both in Eastern Europe and in Central Asia. However, it has been suggested that it is neither sufficiently compatible with civil law systems nor sufficiently innovative in introducing a uniform security right.

16. As a result of its experience with the process of adoption of the Model Law, the EBRD has been able to define a set of ten core principles for a secured transactions law. The overriding principles in this set of principles are that: security should reduce the risk of giving credit, leading to increased availability of credit on improved terms; the law should enable a quick, cheap and simple creation of a proprietary security right without depriving the person giving the security of the use of the collateral; and that if the secured debt is not paid, the holder of the security right should be able to have the collateral realized and have the proceeds applied towards satisfaction of the secured claim before other creditors.

7. World Bank and Asian Development Bank

17. The International Bank for Reconstruction and Development ("the World Bank"), in many of its recent lending operations, has shown an increasing interest in a reform of secured transactions law. Projects financed by the World Bank to reform secured transactions law are underway or are planned in a number of countries. Some of those projects are implemented in cooperation with other international financial institutions, such as the Inter-American Development Bank and the EBRD, or other institutions, such as the Center for the Economic Analysis of Law (CEAL).[23] The World Bank is also preparing a set of principles and guidelines addressing the legal, institutional and regulatory frameworks required for an effective insolvency regime. In the context of this insolvency initiative, the World Bank recognized the importance of the availability of credit at affordable rates for a modern economy and of efficient legislation on security interests for the availability of such lower-cost credit. The tentative results of this initiative refer to the need for a legal regime which would, in principle, recognize security over all types of asset, movable and immovable, tangible and intangible, including inventory, receivables, investment securities and proceeds. Further principles of an efficient legal regime on secured transactions include: the flexibility in identifying the collateral; the possibility of creating a security interest in assets acquired after the conclusion of the security agreement and in all assets of a person; the availability of non-possessory security interests; the ease and cost-effectiveness of creation, perfection (effectiveness as against third parties) and enforcement of a security interest; and the transparency required with respect to security interests.

23/ CEAL has also been involved in national law reform projects financed by the Asian Development Bank. Publicly available materials on CEAL's work may be found at its website (http://www.ceal.org).

18. The Asian Development Bank (ADB) has carried out a survey of secured transactions and insolvency laws of several of its Member States.[24] The results of the survey are contained in a report on Law and Policy Reform to be released by the ADB at its annual meeting in May 2000 (technical assistance projects TA-5795-REG: Insolvency Law Reforms and TA-5773: Secured Transactions Law Reforms). A part of the report, entitled "The need for an integrated approach to secured transactions and insolvency law reforms", highlights the close connection between, and the different objectives of, secured transactions and insolvency law, as well as the need to ensure that these laws are compatible with each other. It notes that, in the area of creation, registration and enforcement of security interests, most of the aims of a developed secured transactions regime would benefit, and be compatible with, an insolvency law regime. In respect of the initial effects of a formal insolvency proceeding upon security interests, the report notes that there is a high degree of compatibility between secured transactions and insolvency law with respect to the recognition of security interests, the lessening or removing of any effects of rights of unsecured creditors on security interests and the non-intrusion into the enforcement rights of secured creditors, at least in the case of liquidation. According to the report, there may be less compatibility concerning the treatment of enforcement rights of secured creditors in the case of reorganization, but that problem may be addressed if the limitations on enforcement rights are time limited, are subject to sensible conditions and may be removed by the court upon an application of the secured creditor. The report suggests that "an integrated approach should be adopted for the reform of insolvency and secured transactions laws".[25] It also suggests that "the issues considered in this report be taken into account in framing good practice guidelines for the development of both secured transactions legal regimes and insolvency law regimes".

B. Non-governmental level

1. International Chamber of Commerce

19. The International Chamber of Commerce (ICC) has prepared a guide providing basic information with regard to retention of title (ROT) in nineteen jurisdictions (ICC publication no. 467). The scope of the guide is limited to sales transactions relating to moveable goods between merchants. As a result, retention of title arrangements relating to real estate or to intellectual property rights, or consumer sales on deferred payment terms and hire-purchase contracts, are not covered. The guide discusses the validity and enforceability of ROT clauses, in particular in the case of insolvency of the buyer and describes different types of clauses. It also discusses issues of private international law, pointing out to the absence of uniform rules governing ROT clauses and drawing a distinction between the contractual and the proprietary aspects of ROT clauses. The contractual aspects are normally subject to the proper law of the contract, while the proprietary aspects are subject to the law of the country in which the subject to the ROT clause is located (*lex situs*). The guide further discusses the problem arising from the application of the *lex situs* if the goods are moved into another country.

24/ Drafts of several relevant papers were discussed in the context of a symposium hosted by the ADB in Manila from 25 to 28 October 1999. The secured transactions laws of five, and the insolvency laws of ten, Asian jurisdictions were surveyed. The survey has been conducted by the Office of the General Counsel of the ADB in collaboration with a number of experts and CEAL.

25/ The need to ensure that secured transaction and insolvency laws are compatible with each other is also recognized in a report of the Group on International Financial Crises of the Group of 22, published in October 1998.

2. International Bar Association

20. The International Bar Association (IBA) established in 1999 a subcommittee on international financial law reform (subcommittee E8) to formulate proposals for simplifying and improving the laws and practice governing secured credit. The subcommittee took as a starting point the core principles used by the EBRD in the transition economies of Central and Eastern European States. The subcommittee is currently conducting a survey of ten jurisdictions to determine how far the laws in those jurisdictions match up to the core principles. The initial results of the study are to be discussed at a conference on international financial law, to be held in Lisbon from 24 to 26 May 2000.

3. American Law Institute

21. In 1998, the American Law Institute (ALI) [26] established an International Secured Transactions Project. The goal of the project is to promote and assist the development of effective and efficient legal regimes for secured transactions in the contexts of international law, United States domestic law and the domestic law of other countries.[27] That goal is to be achieved through participation in the legislative process in the United States and facilitation of the development of secured transactions regimes in other countries, as well as through the preparation of substantive drafts to aid those processes. Such drafts could include: an articulation of the economically beneficial goals of secured transactions law in a credit economy; the preparation of restatement-like principles of United States law of secured transactions; the articulation of criteria for an efficient, effective and appropriate legal regime governing secured transactions; analysis and articulation of the need for, and operational issues with respect to, registration systems; the preparation of a model secured transactions code for enactment as the domestic law of a country; and the preparation of a model international secured transactions law to govern international secured transactions in an integrated and comprehensive fashion. A meeting, to be held in London on
18 July 2000, is organized by the ALI to discuss the next steps to be taken in the context of this project.

4. Central and Eastern European Law Initiative and Institutional Reform and the Informal Sector

22. The American Bar Association, through its Central and Eastern European Law Initiative (CEELI), has been providing assistance to Central and Eastern European, as well as to Central Asian, States. The assistance includes educational efforts in particular areas of law and assistance in the drafting of laws. In many cases, CEELI assistance has been given in the area of secured transactions. CEELI's host countries include Albania, Azerbaijan, Armenia, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia,

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26/ The American Law Institute (ALI) has played a major role in the development of the law governing secured transactions in the United States. UCC Article 9 is a joint creation of the ALI and the National Conference of Commissioners on Uniform State Laws (NCCUSL). The ALI has also contributed to the unification and harmonization of the state law in the United States through the preparation and promulgation of Restatements of Law.

27/ Laws enacted as a result of assistance provided by CEELI or IRIS are discussed in part III. With a view to providing an overview of current projects, their work is described in general terms in this part of the present report.

Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania,, Moldova, Poland, Romania, Russian Federation, Serbia, Slovakia, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine and Uzbekistan. Specific projects include: a concept paper on secured transactions (designed to be used by legislators, the paper provides options, comparing UCC Article 9 with the Model Law prepared by the EBRD); ongoing assistance with the development of a secured transactions law (Latvia, Lithuania and Romania) and education on the concept of a comprehensive secured transactions law (Croatia, Romania, Russian Federation, Slovakia).

23. The University of Maryland, Department of Economics, is a sponsor of the Institutional Reform and the Informal Sector (IRIS). IRIS helps create and implement reforms that facilitate economic growth and strengthen democratic procedures in countries that are in transition from command to market-oriented economies. In this context, IRIS has been providing both substantive and technical input to States upgrading their secured transactions systems, particularly in the area of registration systems. Specific projects include: developing a legislative initiative on secured transactions and a computerized pledge registry (Albania); drafting law on movable collateral and planning for a computerized registry system (IRIS-The Former Yugoslav Republic of Macedonia); reviewing the draft law on secured transactions, training in the operation of the State pledge registry and technical assistance in software development (the Ukraine Collateral Law Extension and Regulatory Reform Initiative); drafting and implementing a law and system for the collateralization of movable property (IRIS-Lithuania); organizing the International Conference on Secured Commercial Lending in the Commonwealth of Independent States (Moscow, November 1994); and a comparative study on the status of collateral law with reference to movable property in fourteen countries (Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Russian Federation, Slovakia, Slovenia and The Former Yugoslav Republic of Macedonia).

III. DIFFERENT APPROACHES IN NATIONAL LAWS

A. Comprehensive systems creating a unified concept of security interest

24. The first model of a unified, general security interest has been UCC Article 9. UCC Article 9 has been adopted by all 50 States of the United States including, after some delay, the civil law jurisdiction of Louisiana. UCC Article 9 was thoroughly revised in 1999, especially by broadening its scope, modernizing the registration systems within the states, and accounting more fully for situations in which the debtors granting security interests are located outside the United States.

25. Personal Property Security Acts sharing many of the concepts and methods of UCC Article 9 have now been enacted by all the common law provinces of Canada and provide for registration of all non-possessory security interests in personal property (movables and intangibles). The first one was the Ontario Act, which came into force in 1976. In 1992, the civil law province of Québec adopted a new civil code, which came into force in 1994 and which provides for a new regime on security in personal property. Although based on civil law concepts, this regime is functionally similar to UCC Article 9 and includes uniform registration requirements for all security devices that would be "security interests" under a UCC Article 9 type of law. New Zealand has also enacted a broad statute on Personal Property Security Interests (1999), and efforts are underway in Australia as well. In Europe, Norway (1980) and Romania (1999) have enacted comprehensive statutes covering, like UCC Article 9, a broad range of assets and security interests and providing for registration of most non-possessory security interests.

B. Laws governing possessory and non-possessory pledges

26. Many countries that have enacted new civil codes or comprehensive laws on property deal with two types of pledges, the traditional possessory pledge and the modern non-possessory pledge. This approach was followed in the civil codes of Georgia (1997), the Netherlands (Book 3 of 1992), Québec (1992) (the unified interest is called a *hypothec*), the Russian Federation (First Part of 1994) and Hungary (1959, articles 251–269 révised in 1996), as well as by the Estonian Property Law of 1993 and the Ukrainian Law on Pledges of 1992.

27. Also the Chinese law on guarantees (1995) falls into this group since it covers neither assignments nor pledges of receivables nor reservations of title. Assignments are dealt with by the contract law of 1999 (articles 79-83). Registration under the law of 1995 is obligatory only for major items of collateral; for other items it is optional.

28. In November 1999, the Government of Vietnam adopted a decree on secured transactions which complements the rules on secured transactions contained in the civil code adopted in 1994. The combined effect of the rules on secured transactions in the civil code and the decree is that a pledge or mortgage can cover property, both presently owned and acquired after the conclusion of a security agreement, to secure the performance of present and future obligations. The decree also permits a non-possessory pledge or mortgage, but such security becomes enforceable against third parties including subsequent secured creditors only upon registration of a notice of the security with the appropriate registration agency in Vietnam. In addition, the decree regulates the enforcement of secured transactions including self-help (i.e. enforcement without recourse to courts). The Government of Vietnam announced that it will adopt a decree on registration of secured transactions by the end of 2000. The proposed decree would set forth the rules governing the establishment of a computerized "notice filing" system (i.e. a system for registration of a notice with limited data about a secured transaction).

C. Laws governing only major non-possessory security interests

29. Several countries have enacted statutes covering non-possessory security interests. Excluded in those countries are reservations of title and leases that function economically as security for the purchase price of the goods rather than as an exchange of money for temporary possession of the goods. In some countries, possibly even security for financing, such as the unregistered security transfer of ownership, may coexist with the new non-possessory security interest which requires registration. As far as the theoretical approaches of these statutes are concerned, two different methods are used, one based on the idea of pledge, the other on the idea of *la propriété-sûreté* (or fiduciary transfer), namely full transfer of title in the collateral to the secured creditor.

1. The pledge approach

30. The pledge approach has been used widely, especially in the new laws on non-possessory pledge enacted in Bulgaria (1996), Chile (1982), Latvia (1998), Lithuania (1997) and Poland (1996). Most of those countries provide for registration of the creditor's interest. By contrast, under Chilean law, effects vis-à-vis third persons depend upon publication of an extract of the security agreement in the official gazette.

31. Virtually the same effect is achieved in Italy by article 46 of the banking law (1993) for securing medium and long-term bank credits to enterprises if the collateral is not subject to registration. This security, called a privilege, confers upon the bank a preferential claim for satisfaction from the collateral. The privilege must be

registered in the enterprise registry and must also be published in the official gazette. The pledge approach comments itself in particular for countries which have new, more comprehensive legislation covering also the traditional possessory pledge.

2. Fiduciary transfer of title

32. The method of a fiduciary transfer to the creditor of title in the collateral has been used by special laws enacted in Brazil (1965), Indonesia (1999) and Montenegro (1996). Generally speaking, the creditor, as fiduciary owner, is subject to rules which in essence hardly differ from corresponding rules established for secured creditors under the pledge approach. In particular, after the debtor's default the fiduciary owner is not allowed to simply appropriate the collateral into full ownership, but must follow rules which correspond to those for the enforcement of a non-possessory pledge.

D. Laws on more global security devices, especially enterprise mortgages

33. It is a central feature of modern legislation on security interests to enable the creation of security interests in a fund with changing contents, especially the debtor's inventory. This purpose can be achieved by softening the rules on specific description of a security interest or by institutionalizing the "enterprise" as a specific type of collateral. In contrast to traditional restrictive models, Sweden and Finland in 1984 and Estonia in 1996 have enacted special laws on enterprise mortgages which, like the English floating charge, allow coverage of virtually all movable assets of an enterprise.

E. Laws on purchase money security devices

34. There is little economic difference between a loan to a debtor (by the seller of goods or a separate lender), enabling the debtor to purchase goods which are, by agreement, collateral for the loan, and the sale of those goods by the seller on credit terms in which the seller retains rights with respect to the goods until the price is paid. However, most legal systems have treated these two models differently. Traditionally, the seller who, has credited the purchase price to its buyer, enjoys special protection of one sort or another. Under most civil codes, the seller is protected by a right of retention of title or enjoys a preference for its claim to the purchase price. Civil codes of the 20th century often allow the seller to retain title to the sold goods until payment of the purchase price (e.g. Dutch civil code, book 3 (1992); Peru (1984); Portugal (1967); Québec (1992); Russian Federation (Part II, 1996); and China, contract law (1999)). By contrast, Paraguay allows merchants to secure purchase money by agreeing upon a non-possessory registered pledge (civil code 1985). If the goods sold are subject to registration, the retention of title must be registered; in other cases, the retention of title clause may be subject to a special form.

35. In most European countries, the seller as owner is entitled to demand return of the sold goods if the buyer, by non-payment of the purchase price, breaches the contract of sale. Usually this is also possible in the buyer's insolvency. Some countries have expressly given effect to, or regulated the exercise of, this right in the buyer's insolvency (e.g. France (1985) and Belgium (1999)). In countries which have introduced a unified security interest (see paras. 24 and 25), an agreement that the unpaid seller will retain title is limited in effect to retention of the unified security interest. However, in all of these countries, such a security interest serving to secure purchase money enjoys a preferred status as against competing non-purchase money interests.

F. Laws governing assignment of receivables

36. Some European countries have amended their laws or enacted new legislation in order to adapt their rules regarding assignments of receivables to modern demands for the financing of enterprises. In particular, the requirement of notifying the debtor as a condition for giving effect to the assignment vis-à-vis third parties has been abolished, either almost completely (Belgium 1998) or replaced by a less burdening device at least for the use of receivables arising from transactions between merchants as collateral for bank credits (France 1981).

IV. TRENDS

A. National level

37. There is a clear trend towards stressing the importance of an adequate legal regime for non-possessory security. Less prevalent, so far, though, have been legal regimes that bring about the generalization of non-possessory security, that is, allowing use of these devices not only by special groups of creditors or debtors or in specific items of collateral, but by all creditors and in all collateral. However, a trend in this direction is discernible. Modern laws on non-possessory security also seek to make security available for medium and long-term credits for financing not only in connection with the acquisition of individual equipment, but also with the current business affairs of the debtor. Security of a more permanent character in a changing pool of assets (such as inventory, raw materials, semi-finished goods or receivables) can only be preserved if the idea of a fund with changing elements (such as inventory) is accepted. The clearest, although arguably extreme, expression of this principle is the concept of security in a whole enterprise or defined parts of it. An alternative (or supplementary) idea is that security may be extended into proceeds or products of the original collateral.

38. Most new legislation also accepts, at some level, the idea of registration of non-possessory security interests as a means of giving publicity. However, the forms and especially the content of the data to be registered vary considerably. Occasionally other forms of publicity have been chosen, such as publication in an official gazette. The issue whether unpaid sellers should be protected by being allowed to retain title or by being referred to a non-possessory pledge is still solved quite differently in different countries. However, there is broad agreement that such sellers should benefit from special protection in the case of conflicts of priority, even if their retention of title is limited in effect to a pledge.

B. International and regional levels

39. The problem of assuring the preservation of security rights in collateral used in border-crossing trade has so far been addressed only for special items. It should be noted that, in countries following civil law models, the issue hardly arises in receivables because these usually are considered to be stationary. For high-value mobile equipment, the Unidroit preliminary draft Convention should solve the cross-border problem, since it specifically addresses the movement of these assets across national borders. By contrast, security interests in other goods and assets are not specifically protected against loss which may result from their movement into another jurisdiction. The sellers of export goods and their financiers are particularly exposed to this risk.

V. NEED FOR FURTHER WORK

40. While, as the preceding survey demonstrates, much has occurred in the law of secured credit over the last twenty-five years, it would not be accurate to conclude that the international legal situation is one that is

conducive to the efficient and effective extension of secured credit. Rather, there are significant problems that impede this mechanism to make credit more easily available at lower cost.

A. Current Problems

1. Inadequate domestic law

41. In many situations, the most significant impediments to international secured transactions arise not from the differences between the secured credit laws of the States involved but, rather, from the fact that domestic legal systems governing secured credit are simply inadequate to support the extension of credit at lower costs. While these systems may perhaps be justified on grounds other than efficacy in enabling the extension of such credit, their effect on a credit economy cannot be understated. The problems from such systems can arise from a variety of causes:

(a) There may be limits on the situations in which non-possessory security interests may be used. Such limits may relate to the identity of the debtor or of the creditor, or to the nature of the collateral.

(b) There may be uncertainty resulting from the lack of comprehensive rules that resolve, in a predictable way, issues that are likely to arise in secured transactions. While some legal systems have extensively developed laws governing secured transactions, other systems have only skeletal rules. While skeletal rules have some advantages, there is an uncertainty cost associated with them.

(c) There may be problems associated with rules that inhibit the creditor's practical ability to utilize the value of the collateral to obtain satisfaction after the debtor's default. This can occur in several ways, including:

(i) There may be rules that make it inordinately difficult for the creditor to obtain possession of the collateral from the debtor within a reasonable period of time, thus adding to the creditor's expenses and increasing the likelihood that the value that can be obtained from the collateral will decrease because of depreciation.

(ii) There may be rules that make it inordinately difficult for the creditor to dispose of the collateral at the highest possible price.

(d) The absence of rules that enable creditors to determine the status of their rights as against other potential claimants of the collateral (i.e. priority) before extending credit.

2. "Friction" resulting from the possibility that more than one country's law might govern

42. The domestic law governing secured credit varies greatly from country to country. The result of this variation is to increase the cost or decrease the availability of secured credit across national borders. Such increased costs (which may result in decreased availability of credit because the costs would make the extension of credit unprofitable for the party that bears them) are of several varieties:

(a) *The cost of obtaining understanding of the secured credit law of more than one jurisdiction*. In any transaction in which the law of more than one State might apply, a prudent party must ascertain the law of all relevant States. While such a party may be quite familiar with the legal terrain in the State or

States of its principal operations, it is unlikely to be aware of the laws of other States with a similar degree of familiarity.

(b) *The cost of determining which jurisdiction's law is likely to govern.* If more than one jurisdiction is involved, and the law of the relevant jurisdictions differs with respect to important issues relating to the rights of parties with respect to the transaction, this choice of law determination is essential to identification of those rights. In most cases, such a determination must be made in advance, or the creditor will be unwilling to extend credit.

(c) *The cost associated with the inability to determine definitively which jurisdiction's law will govern various aspects of the transaction.* Despite the importance of the choice of law determination, there will be many cases in which the determination cannot be made in advance with any degree of certainty. Unfortunately, choice of law rules differ significantly from jurisdiction to jurisdiction, so that the choice of law principle that may be applied to a particular transaction may depend on the location of the forum. Moreover, in some jurisdictions, it may be difficult to ascertain in advance the choice of law rule that might be applied.

3. Loss of security if collateral crosses national borders

43. In many cases, due to divergent national regimes governing secured credit, the continued existence of a security interest, validly created in one country, is denied in another country if the collateral is moved from the first country to the second country. This problem causes particular difficulty in the case of collateral which, by its nature, crosses national borders, such as export goods or trucks.

B. The case for further work

44. Through its continuing work on the draft Convention on Assignment of Receivables (see para. 6), UNCITRAL has recognized the advantages of facilitating the development of legal regimes that increase the availability of credit at lower cost. Moreover, in the context of developing that draft Convention, UNCITRAL has more specifically recognized the role played by personal property as collateral in increasing the availability of credit at lower cost. Thus, UNCITRAL may logically extend its work to more comprehensive efforts in the area of personal property security.

45. The benefits from further work in this field can be of two types. First, by lessening the "friction" between national legal systems and helping to improve domestic law, UNCITRAL can help ease the difficulties described above that inhibit the possibility of extending greater amounts of credit at lower cost at both the domestic and international levels. Second, as studies of the World Bank indicate (see para. 17), modernization and optimization of secured credit law can lead to expanded economic development and, therefore, promote the general welfare.

VI. POSSIBLE FUTURE EFFORTS BY UNCITRAL

A. A convention unifying substantive rules governing security interests

46. Complete unification of the substantive rules governing security interests in the world's nations could be brought about only by a convention binding upon all Contracting States. Such a convention, by establishing a high and uniform standard, would remedy the inadequacies of many national legal systems mentioned in paragraph 41 and would facilitate the extension of secured credit across borders, thus overcoming the obstacles mentioned in paragraphs 42 and 43. However, at present the national legal systems are still too divergent, both in terms of the legal techniques used and of the substantive solutions, to offer a realistic chance of adoption of such a convention by many countries. Also, a convention would not be flexible enough to take into account the varying circumstances of the countries of the world, including their systems of substantive and procedural law.

B. A convention establishing uniform conflict rules

47. A project leading to a convention that would, nonetheless, be much less ambitious than the unification of the substantive law of security interests would be a project limiting itself to establishing some uniform conflicts rules for security interests. Such a convention could address the present shortcomings identified in paragraph 42. Conflicts rules may be more acceptable to States since they do not, as a rule, affect the national legal regimes. Moreover, there is already a common basis on which to begin such work: the principle of the *lex situs* is recognized in most jurisdictions as governing many rights in movables. Yet, there are variations as to the extent to which this principle governs. In addition, some deviations from this principle will be necessary, especially for means of transport and other mobile goods, and rules for intangibles may follow other organizing principles (see articles 24-26 and 28-31 of the UNCITRAL draft Convention on Assignment of Receivables). However, the major difficulties arising in the context of the cross-border movement of collateral cannot be solved by adequate conflicts rules alone. Because of widely diverging national regimes (see paragraph 41), after collateral has been moved to another country and, therefore, may become subject to the new *lex situs*, it may be necessary to requalify the imported foreign security interest and adapt it to the new national regime. This is difficult if the two countries involved use very different techniques; or if, even if the techniques are similar, the country to which the collateral has moved establishes requirements going beyond those of the original country, for example, demands a "certain date" for the underlying agreement, or registration. To some degree, such difficulties can be surmounted by providing grace periods for adaptation, or requiring the contracting parties to amend and adapt their contract and/or the security to the requirements of the new *lex situs*.

C. A convention or model law creating an international security interest

48. Rather than creating law for domestic transactions, it might be possible to create "international interests" in certain types of collateral (see para. 9). A benefit to be derived from such an approach is that the interest that would be created would have its own body of substantive law. There are also disadvantages to such an approach, though. For one, a body of law that would apply only to an interest created in an international transaction would, by its nature, inevitably coexist awkwardly with domestic law governing similar transactions that have no international component. For example, in a priority dispute between two claimants, one with an international interest and the other with an entirely domestic interest, difficult choices would need to be made concerning the legal regime that governed. If, despite such obstacles, creation of one or more international interests were to be undertaken, a determination would be required whether to proceed by way of a convention or by way of a model law. A convention to which States accepting the concept of the international interest would become Contracting States would appear feasible, but a model law might serve the same purpose as between States that have adopted it.

D. A statement of principles accompanied by a model law

49. A more realistic solution might consist of a model law which, by its nature, would not require countries to accept or reject it as a whole. With this limitation in mind, the greatest possible benefit would be brought about by a comprehensive law. The product could have two parts. The first part would be a statement of principles for secured credit systems, explaining the structure of the relationships between the debtor and the secured creditor and between the secured creditor and other possible claimants to the collateral and indicating why particular structures can facilitate extension of credit while protecting debtors' rights in the event of default. The second part would be a model law embodying those principles and applying to security interests in all types of personal property, regardless of the form of the transaction. [28] Both the envisaged principles and the model law might also deal with the problems of cross-border movement of collateral, along the lines mentioned in paragraph 43.

50. A comprehensive model law, as opposed to model laws for specific types of transactions or collateral, has the potential to bring about the greatest possible benefit. It would create the conditions for a domestic credit economy in nations enacting it and, to the extent that the model law is adopted by many nations, the resulting harmonization would reduce the "friction" costs and substantive obstacles resulting from differing legal regimes in international transactions. However, to the extent that such a model law would need to reflect certain fundamental guiding principles that would not be common ground to all legal systems, it would represent a significant change from current law in many countries and may, as a result, not be sufficiently acceptable. It may, therefore, be necessary to envisage a model law with alternative provisions.

E. More limited solutions

1. Narrower substantive model laws

a. Particular types of collateral

51. A possible alternative to the preparation of a comprehensive model law governing all aspects of secured credit could be the promulgation of discrete model laws for specific transactions or types of collateral. This result could be brought about either by drafting separate model laws or by extracting the relevant portions from a comprehensive model law. Types of collateral that could be separately treated in this way might include, for example, investment securities or goods (or even a subset of goods such as inventory or business equipment).

52. The production of narrower model laws in place of (or as an alternative to) a comprehensive model law may have great advantages in terms of acceptability. By providing model laws limited in scope to a particular type of collateral or transaction, it might be easier for a country to adopt one or more such laws. For example, in the particular case of security interests in investment securities, there is relatively little developed law in most countries. Thus, such a limited model law could provide support for increased access to credit in this area. The work of the European Union provides useful precedent of this approach (see paras. 11 and 12). On the other hand, by promulgating model laws limited in scope to a particular type of collateral, one might increase the chance of some enactments but miss the chance to accomplish broader substantive reform.

28/ The experience gained in the context of the preparation of the Model Law and the core principles by the EBRD (see para. 16) could provide useful guidance.

b. Model rules governing specific aspects of secured credit

i. Model rules for priority systems based on filing/registration

53. Many countries base all or part of their priority systems for secured credit on the order of filing or registration of information concerning a security interest, or are considering establishment of such priority systems. Yet, the rules governing such systems vary significantly from country to country and the operational details of such systems also vary quite substantially. Model rules in this regard could assist countries in devising and maintaining the best possible priority systems of this type and lead to greater uniformity across borders, as well as lower transaction costs.

ii. Model rules for repossession and disposition of collateral

54. Collateral securing a debt will not lower the cost of credit unless, upon the debtor's default, the collateral can be efficiently taken and disposed of to generate the funds to fulfill the debt. After all, the purpose of collateral is to create a potential source of fulfillment of the debtor's obligations that the creditor will be able to turn to in the event of the debtor's default. While debtors must be protected against abusive foreclosure practices and collusive dispositions, protection that makes it inordinately difficult to convert the collateral to cash for application to the secured debt may be illusory because the resulting system might not generate credit. This will occur if those protections significantly lessen the likelihood that the funds generated from the collateral can contribute materially to fulfillment of the debtor's obligations. A model law with rules for repossession and disposition of collateral could serve an important role for countries that would like to reform their post-default procedures.

2. Conflict-based solutions

55. In international secured transactions, uncertainty as to which country's law will govern often adds to the cost of a transaction. At the very least, the cost of ascertaining the law that is most likely to govern will often be non-trivial and thus will be a cost that must be borne by the transaction. Moreover, agencies that rate large transactions report that, because of the uncertainties as to which country's law will govern, they typically assume that the law that is least advantageous for a transaction will govern it rather than speculate as to which law will govern. In the absence of substantive harmonization, conflict-based solutions, if achievable, could reduce some of these costs. While a model law might be possible in this area, it would appear that conflict-based solutions should be in the form of conventions.

a. Tangible property

56. With limited exceptions discussed below, conflict-based solutions for tangible property do not seem to show much potential for further work. After all, the *lex situs* principle is so well established, at least for priority matters, as to not leave much room here. Even the recent revision of UCC Article 9 in the United States, which departs from *lex situs* in the context of "perfection" (i.e. effectiveness as against third parties), reverts to it in the more important context of priorities.

i. Recognition of established interests

57. One limited area in which a conflict-based solution might provide some value is in the context of situations in which an enforceable interest in personal property securing a debt is created as between debtor and creditor in one country, after which the debtor moves the collateral to a different country that does not recognize the interest created in the first country. An example is provided by a floating charge on goods in England that are later moved to France, which does not recognize the rights associated with an English floating charge. A conflict-based solution could provide that, as between the parties (and, perhaps, to some extent with respect to those who derive their interest in the collateral from the debtor), the interest created in the first country will be recognized in the second country.

ii. Recognition of established priorities

58. In the same spirit as the point made in paragraph 57, it can be argued that international stability of security interests would be increased by providing that, if two creditors in the original country both have security interests in the same item of collateral, their relative priority should not change simply because the collateral has been moved to a different country. Thus, a conflict-based solution could provide that, as between competing secured parties (and, perhaps, to some extent with respect to those who derive their interest in the collateral one of those parties), priorities established in the original country would be respected in the second country.

b. Intangible property

59. The class of intangible property that most often serves as collateral is receivables. That property is the subject of the draft Convention now being completed by UNCITRAL (see para. 6), which contains both substantive and conflict-based solutions (see A/CN.9/470). There are, however, two other types of intangible property worthy of some thought for a conflicts-based solution.

i. Investment securities

60. In recent years, investment securities have been transformed in many countries from quasi-tangible property memorialized in a certificate to intangible property representing a claim against a securities intermediary. Inasmuch as the law governing interests in investment securities as collateral varies significantly from country to country, a conflict-based solution could provide some certainty here by providing which country's law would govern international interests in such securities. [29]

ii. Intellectual property

61. Intellectual property represents an emerging class of intangible property that could probably benefit from increased certainty as to which country's law governs and, therefore, a conflicts-based solution seems appealing on the surface. Yet, as this class of property is developing and changing rapidly in response to new information technologies, any effort undertaken at this time would likely be premature, a fact that counsels against instituting such a project at this time.

3. A statement of principles accompanied by a legal guide

29/ See article 9 (2) of European Union Directive on Settlement Finality, referred to in paragraph 12.

62. This approach is a variation of, and could be combined with, the approach discussed in paragraphs 49 and 50. A model law would be more desirable from the point of view of completeness and uniformity. If, however, the preparation of such a model law proves to be impossible, the preparation of a set of key objectives and core principles for an efficient legal regime governing secured credit along with a legislative guide (containing flexible approaches to the implementation of such objectives and principles, and a discussion of alternative approaches possible and of the perceived benefits and detriments of such approaches) would still be sufficiently useful to justify future work.

VII. CONCLUSIONS

63. With its work on assignment law (see para. 6), the Commission made a first step towards facilitating credit at more affordable rates and creating a level playing field for business parties in international commerce, at least with regard to access to lower-cost credit. In addition, in the last twenty-five years, significant developments have taken place in that direction, both at the national and the international level. However, secured credit law in much of the world is still not conducive to the efficient and effective extension of secured credit. Inadequate domestic law, friction resulting from the possibility that more than one country's law might apply and loss of security if collateral crosses national borders continue to impede international commerce (see paras. 41-43), while creating a competitive disadvantage for business parties who do not have sufficient access to lower-cost credit. In view of this situation, the Commission may wish to draw the conclusion that further work in the field of secured credit law would be highly desirable.

64. While there are many areas in which further harmonization of secured credit law would be beneficial, a decision as to which areas to select requires that thought be given to practical considerations. In determining whether particular projects are appropriate for treatment in the near future, the Commission may wish to consider, *inter alia*: whether the subject of the proposed project is ripe for articulation in the form of law; whether it is possible to prepare the product in a reasonable period of time; and what is the likelihood of any product becoming acceptable to States and to participants in international commerce. Taking into account those considerations, the experience gained by the Commission in its work on assignment law (see paras. 6, 44 and 45) and the various possible solutions discussed in the present report (see paras. 46-62), the Commission may, subject to further consideration, wish to draw the following tentative conclusions:

(a) At the present time, the preparation of a convention unifying substantive rules governing security interests would in all likelihood not be feasible, in particular in view of the wide divergences existing among legal systems and the complexity of the issues involved in secured credit law (see para. 46).

(b) An acceptable convention establishing uniform conflict rules could probably be prepared (see para. 47). However, the usefulness of such a convention may be limited, if it is not supplemented by substantive law rules, since the problems identified in the present report (see paras. 41-43) could not be resolved by conflict rules alone.

(c) A model law or a convention establishing a new, international security interest, which would coexist with domestic security interests, might usefully be prepared, provided that its scope would be limited to certain types of collateral (see para. 48).

(d) A statement of principles accompanied by a comprehensive model law would be both desirable and feasible, in particular if the model law would include alternative provisions to the extent necessary (see paras. 49-50).

(e) In contrast to a comprehensive model law that would apply to all types of asset, discrete model laws governing certain types of asset or specific aspects of secured credit law may be less desirable but more feasible, in particular with respect to certain types of collateral, such as investment securities (see paras. 51-61 and 66).

(f) A statement of principles accompanied by a guide would probably be a text with the highest degree of feasibility at the present time (see paras. 62 and 65). Such a project would also be sufficiently useful. Whether it would be feasible to prepare, in addition to the principles, a comprehensive model law could be considered in the context of the preparation of the principles.

65. With regard to the preparation of a set of principles with a legislative guide in particular, the Commission may wish to note that any work to be undertaken could draw on work by the Commission on assignment of receivables and by other organizations, such as EBRD, the World Bank, ADB, OAS and IBA, in other relevant areas (see paras. 15-18 and 20), as well as on any work the Commission may wish to undertake in the field of insolvency law (see A/CN.9/469, para. 140). In fact, as the work undertaken by the World Bank and ADB shows (see paras. 17 and 18), any principles that the Commission may wish to prepare on insolvency law would necessarily deal with the treatment of security interests in the case of insolvency and make assumptions with regard to core principles of an efficient secured transactions law that would be compatible with any insolvency law principles to be prepared by the Commission. As a result, the considerations of the Working Group on Insolvency Law would be relevant and could assist in establishing the feasibility of the Commission preparing a set of principles for an efficient secured transactions law. In its consideration of the matter, the Commission may wish to take into account that parallel work by the Commission in the areas of secured transactions and insolvency law could ensure compatibility between any principles on insolvency and secured transactions law and, as a result, an appropriate balance among the interests of preferential, secured and unsecured creditors.

66. Furthermore, with regard to work aimed at the preparation of uniform rules for specific transactions or specific collateral, such as investment securities, the Commission may wish to note that any work to be undertaken could usefully draw on the work by other organizations, in particular by the European Union with the assistance of organizations such as ISDA (see paras. 11-12 and footnote 20), as well as on any work to be undertaken by the Commission on insolvency law. A text on security interests in investment securities could establish a new international interest (see para. 48) and address, inter alia, conflict-of-laws issues (see para. 60).

67. With a view to further establishing the feasibility of the work mentioned in paragraphs 65 and 66 and identifying in more detail the relevant problems and the possible solutions, the Commission may wish to request the Secretariat to prepare a study for submission at the thirty-fourth session of the Commission. The study could examine, in particular, whether current trends establish sufficient common ground among the various legal systems and economies at different levels of development to warrant further work by the Commission. The study could also discuss the advantages and disadvantages of a comprehensive model law on security interests, a model law on particular types of collateral, such as investment securities, and a set of principles, possibly with a guide and general legislative recommendations. The study could also draw and build on the work completed, underway or announced by other organizations, including Unidroit, the European Union, OAS, EBRD, the

World Bank, ADB, IBA, ICC and ALI. On the basis of that study, the Commission may wish to decide, at its thirty-fourth session, whether to undertake any further work in the field of secured credit law.

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Transport law: possible future work

Report of the Secretary-General

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I. Introduction

1. When considering future work in the area of electronic commerce, following the adoption of the UNCITRAL Model Law on Electronic Commerce at its twenty-ninth session, in 1996,[1] the United Nations Commission on Trade Law considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.[2]

2. The Commission was told that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to the contract of carriage. Some States had provisions on those issues, but the fact that those provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.

3. It was then suggested that the Secretariat should be requested to solicit views and suggestions on those difficulties not only from Governments but in particular from the relevant intergovernmental and non-governmental organizations representing the various interests in the international carriage of goods by sea. An analysis of those views and suggestions would enable the Secretariat to present, at a future session, a report that would allow the Commission to take an informed decision as to the desirable course of action.

4. Several reservations were expressed with regard to the suggestion. One was that the issues to be covered were numerous and complex, which would strain the limited resources of the Secretariat. Priority should instead be given to other topics that were, or were about to be, put on the agenda of the Commission. Furthermore, it was said that the continued coexistence of different treaties governing the liability in the carriage of goods by sea and the slow process of adherence to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) made it unlikely that adding a new treaty to the existing ones would lead to greater harmony of laws. Indeed, there was some danger that the disharmony of laws would increase.

5. In addition, it was said that any work that would include the reconsideration of the liability regime was likely to discourage States from adhering to the Hamburg Rules, which would be an unfortunate result. It was stressed that, if any investigation was to be carried out, it should not cover the liability regime. It was, however, stated in reply that the review of the liability regime was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that either were not adequately dealt with or were not dealt with at all in treaties.

6. Having regard to those differing views, the Commission did not include the consideration of the suggested issues on its agenda at that stage. Nevertheless, it decided that the Secretariat should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the Comité maritime international (CMI), the International Chamber of Commerce, the International Union of Marine Insurance, the International Federation of Freight Forwarders Associations, the International Chamber of Shipping and the International Association of Ports and Harbors.

7. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. That analysis would allow the Commission to take an informed decision as to the desirable course of action.[3] Strong support was expressed at that session for the exploratory work being undertaken by CMI and the secretariat of the Commission. The Commission expressed its appreciation to CMI for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level.[4]

8. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved. In undertaking the study, it had been realized that the industries involved were extremely interested in pursuing the project and had offered

their technical and legal knowledge to assist in that endeavour. Based on that favourable reaction and the preliminary findings of the working group, it appeared that further harmonization in the field of transport law would greatly benefit international trade. The working group had found a number of issues that had not been covered by the current unifying instruments. Some of the issues were regulated by national laws that were not internationally harmonized. Evaluated in the context of electronic commerce, that lack of harmonization became even more significant. It was reported that the working group had identified numerous interfaces between the different types of contracts involved in international trade and transport of goods (such as sales contracts, contracts of carriage, insurance contracts, letters of credit, freight forwarding contracts and a number of other ancillary contracts). The working group intended to clarify the nature and function of those interfaces and to collect and analyse the rules currently governing them. That exercise would at a later stage include a re-evaluation of principles of liability to determine their compatibility with a broader area of rules on the carriage of goods.[5]

9. It was also reported at the thirty-second session of the Commission that the working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.[6]

10. At its thirty-second session, the Commission had expressed its appreciation to CMI for having acted upon its request for cooperation and had requested the Secretariat to continue to cooperate with CMI in gathering and analysing information. The Commission was looking forward to receiving a report at a future session presenting the results of the study with proposals for future work.[7]

11. The purpose of the present report is to apprise the Commission of the work that has been carried out thus far by CMI, in cooperation with the secretariat of the Commission, since the thirty-second session of the Commission. The information is intended to facilitate the Commission's decision on the nature and scope of any future work that might usefully be undertaken by it.

II. Progress of the work of the Comité maritime international

12. In cooperation with the secretariat of the Commission, CMI undertook to organize a broad investigation of views and suggestions relating to practical problems and possible solutions to those problems. The CMI Executive Council set up a Steering Committee to consider the project. The Steering Committee issued a report dated 29 April 1998[8] in which it outlined the work that should be undertaken by a working group. An international working group was then established; it studied the issues outlined in the Steering Committee's report and drew up a questionnaire that was sent to all national maritime law associations in May 1999.

13. The questionnaire covered the following issues: (a) inspection of the goods and description of the goods in the transport document; (b) transport document (date, signature and statements in the transport document, other than for description of the goods); (c) rights of the carrier (freight, deadfreight, demurrage and other charges and lien); (d) obligations of shipper, intermediate holder and consignee; (e) delivery and receipt of the goods at destination; and (f) rights of "disposal".

14. The Executive Council of CMI established an international subcommittee on issues of transport law in which delegations from all national maritime law associations, as well as the international organizations involved in trade and shipping, were invited to participate. The International Subcommittee met in London on 27 and 28 January 2000; it is scheduled to meet again in London on 6 and 7 April 2000 and in New York on 7 and 8 July 2000. From the beginning of the project, there were consultations with the different sectors of industry in the form of round tables and bilateral meetings.

III. Overview of issues and stage of consideration of possible solutions

discussed the six issues referred to in paragraph 12 above. Under its terms of reference, the International Subcommittee is required to prepare an outline of an instrument designed to bring about uniformity in transport law. The first meeting identified issues that such an instrument could resolve.

16. The paragraphs below present a summary of the information reviewed by the International Subcommittee at its first meeting concerning the state of the law with respect to those six topics and possible solutions that, as agreed at the first meeting of the International Subcommittee, are being put forward by the working group for discussion at the second meeting of the International Subcommittee. In the paragraphs below, references to countries are to the countries of the national maritime law associations and national members of other organizations that provided replies to the questionnaire. The replies are available on the CMI web site (www.comitemaritime.org).

A. Inspection of the goods and description of the goods in the transport document

17. When the carrier or the actual carrier takes the goods in its charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading that should state, *inter alia*, the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, the weight of the goods or their quantity otherwise expressed (all such particulars as furnished by the shipper) and the apparent condition of the goods (see the International Convention for the Unification of Certain Rules relating to Bills of Lading (Hague Rules), art. 3, para. 3, subpara. (b); the Hague Rules as Amended by the Brussels Protocol 1968 (the Hague-Visby Rules), art. 3, para. 3, subparas. (b) and (c); and the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules), art. 15, para. 1, subparas. (a) and (b)).

18. The issue arises as to the extent to which the carrier is responsible for inspecting goods carried, in particular in situations where actual inspection may not be physically reasonable or economically feasible, such as in carriage of bulk cargo, containerized goods, carriage of numerous small items, technical cargo or where no weighing facilities are available at the load port. Another issue is to what extent the details provided in the transport document should be prima facie evidence of that information, in particular in situations where such information is received by electronic means from the shipper.

19. The responses to the CMI questionnaire revealed considerable consistency in the approach to this issue. Goods are taken to be in good "apparent" order and condition as determined by external visual inspection (in Australia, Canada, China, Hungary, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America), without interfering with the packing (in Canada), also taking into account, as specified in some legal systems, other elements such as weight (in Australia and Japan), noise and smell (in Japan), and mate's receipts (in New Zealand). In Poland the test is one of good faith: it is assumed that the carrier had no knowledge (despite the exercise of due diligence) that the goods were shipped in a condition other than as described in the bill of lading. In Indonesia it appears that the word is understood as meaning that the carrier has received the goods in order and good condition, having "checked and rechecked" the condition of the goods.

20. A carrier has no reasonable means of checking particulars provided by a shipper where the goods are containerized and have been packed by the shipper (in Argentina, Australia, Indonesia, the Netherlands, Norway, the United Kingdom and the United States), for bulk goods (in Italy and the Netherlands) except for weight and survey reports (in China), for packed goods in general (in the Netherlands), for technical cargo (in Norway), where it is uneconomical to tally the cargo (in Italy and the Netherlands) or where no weighing facilities are available (in the United States).

21. The general position is that the carrier may refuse to insert information in a bill of lading where it is obviously incorrect (in Australia, Canada, the Netherlands, Norway, Spain and the United States) or where it has reason to believe that the information is incorrect (in Australia, Canada, Norway, Spain and the United States). However, in Italy the carrier may only refuse to insert information in a bill of lading that it has actually found to be incorrect.

22. At the first meeting of the International Subcommittee there was agreement that, when the carrier had reasonable grounds for suspecting that the information furnished by the shipper did not accurately represent the goods, the carrier was obligated to check the information if it had a reasonable means of doing so. Thus the carrier would be excused from including the otherwise required information only when there was no reasonable means of checking it.

23. Other issues considered by the International Subcommittee included the conditions under which a carrier could

protect itself by omitting from the transport document a description of the goods that it was unable to verify (for instance, by inserting clauses such as "said to contain" and "shipper's weight and count"), the effects of qualifying clauses in transport documents and the desirability of developing harmonized provisions regulating the use and effects of such clauses, taking into account their practical implications in respect of containerized transport.

B. Transport document

24. While article 16 of the Hamburg Rules lists certain minimum information that the bill of lading is required to contain, this question is left largely open under the Hague-Visby Rules, which, in particular, make no reference to date and signature of the bill of lading or methods for identifying the carrier. The content of the bill of lading and the consequences of missing or inaccurate information are thus largely left for domestic law.

1. Date

25. Dating of the transport document is at present either mandatory (in Argentina, China, the Democratic People's Republic of Korea, Germany, Indonesia, Lebanon, the Netherlands, Norway, Poland, Spain and Turkey) or, while not mandatory, common practice (in Australia, Canada, New Zealand, the United Kingdom and the United States), usually in order to satisfy the requirements of banks issuing letters of credit.

26. The applicable date is the date of signature of the bill of lading (in the Democratic People's Republic of Korea, Italy, Japan and the Netherlands), the date of issue (in Germany and Poland), the date of receipt or loading on board (in Australia, Canada, China, Italy, Japan, New Zealand, Norway, Turkey, the United Kingdom and the United States) or within 24 hours from the date of placing the goods on board (in Spain).

27. Most of the participants at the first meeting of the International Subcommittee felt that the date should not be considered an essential element of the bill of lading and an undated bill of lading should be considered valid. It was suggested, however, that a harmonized general provision that clarified the significance of the date mentioned in the bill of lading would be useful. It was also suggested that the International Subcommittee should examine the legal consequences of the issuance of a bill of lading bearing an inaccurate or incorrect date.

2. Signature

28. The signing of bills of lading is mandatory in some countries (as in Argentina, China, the Democratic People's Republic of Korea, Hungary, Italy, Japan, Lebanon, the Netherlands, Norway, Poland, Spain and Turkey), when it is not required (in Australia, Canada, Germany, Indonesia, New Zealand, the United Kingdom and the United States), bills of lading are signed at the request of the sender (in Germany) or are generally signed in practice (in Australia, Canada, New Zealand, the United Kingdom and the United States) on account of banks' requirements for the issuance of letters of credit.

29. It has been suggested that the International Subcommittee should give special attention to the legal consequences of the lack of authority to sign a bill of lading on behalf of the apparent carrier and consider which are the acceptable means of signature of the transport document.

3. Statements in the transport documents in addition to the description of the goods

30. Some national systems require the bill of lading to state the name of the carrier (e.g. in China, Germany, Italy, Japan, Lebanon, Norway, Poland, Spain and Turkey) and the address of the carrier (in China, Germany, Lebanon and Norway) or the master (in Spain), or merely the carrier's domicile (in Italy) or "designation" (in Poland). Other systems have no such requirements (in Argentina, Australia, Canada, Hungary, Indonesia, the Netherlands, New Zealand, the United Kingdom and the United States), although in some of these systems the carrier's name is customarily indicated.

31. In this context, it has been suggested that the International Subcommittee should consider which are the relevant elements for the identification of the carrier and what are the implications for the purpose of the identification of the carrier of a valid incorporation of the terms of a charter party in the bill of lading.

C. Rights of the carrier

32. The main issues concerning the rights of the carrier that have been considered thus far by the International Subcommittee include the following: when freight is earned and when it is payable; what is the effect of contractual frustration on the obligation to pay freight; whether the carrier has a right to withhold delivery of the goods until freight is paid; whether the carrier may exercise a lien in the cargo; to what extent the shipper may rely upon a cesser clause to avoid liability; whether the carrier can claim for deadfreight,

demurrage and other charges in the same manner as freight, or whether this should depend on the transport document.

1. Freight

33. The meaning of "freight prepaid" and "freight collect" are largely of uniform interpretation, that is, "prepaid" denies the carrier the right to claim freight from the consignee, while "collect" means that the carrier may claim freight from the consignee (in Argentina, Canada, China, the Democratic People's Republic of Korea, Indonesia, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Turkey and the United States). There is also significant consistency in approach to liability for payment of freight, with the receiver being liable to pay the freight (in Canada, Germany, Hungary, Japan, Lebanon, Poland, Norway and Turkey), or liability prima facie resting with the shipper (in Canada, Hungary, the Netherlands and the United States), but otherwise depending on the terms of the contract (in Argentina, Australia, China, Italy, Japan, New Zealand and Spain). Intermediate holders may (in Canada) or may not (in Japan) be liable for freight.

34. Freight is predominantly considered to be earned when the carriage has been performed, unless the contract states otherwise (in Argentina, Australia, Canada, China, Indonesia, Italy, Japan, the Netherlands, New Zealand, Norway, Turkey, the United Kingdom and the United States). Similarly, freight is typically payable when it is earned (upon arrival) unless the contract states otherwise (in Argentina, Australia, Canada, China, Indonesia, Italy, Japan, the Netherlands, New Zealand, Norway, Turkey, the United Kingdom and the United States).

35. The effect of frustration varies: the carrier may retain a right to freight (in Italy) or the carrier may retain a right to freight only if it has been earned (in the United Kingdom); in the proportion that has been earned compared with total freight (in Hungary, Japan, Norway, Spain and the United States); and in the freezing of the freight obligation, so that, if freight is paid before the frustrating event, the carrier retains it, and if not the carrier has no right to claim payment of freight (in Australia and New Zealand).

2. Deadfreight, demurrage and other changes

36. The shipper's liability for deadfreight, demurrage and other charges depends on the contract (in Argentina, Australia, Canada, Japan, New Zealand, Norway and the United Kingdom), although in Italy the shipper is liable for deadfreight, and in Turkey the carrier may refuse delivery for non-payment of deadfreight and other charges in the same manner as freight. Cesser clauses are generally valid (in Australia, Canada, China, Italy, the Netherlands, Norway, Spain, Sweden, Turkey, the United Kingdom and the United States), with Indonesia being an exception.

37. The consignee would appear, unless the contract specifies otherwise, to be liable for deadfreight, demurrage and other charges (in Australia, Canada, Japan, the Netherlands, New Zealand, Norway and the United Kingdom), although in Norway the consignee is only liable for loadport demurrage where its amount is expressly stated on the bill of lading.

3. Lien

38. The right of a carrier to withhold delivery of goods until freight has been paid is, with few exceptions (in Argentina), widely recognized (in Australia, Canada, China, Germany, Hungary, Indonesia, Italy, Japan, Lebanon, the Netherlands, New Zealand, Norway, Poland, Spain, Turkey, the United Kingdom and the United States). The carrier's right is possessory in nature and typically does not continue after delivery of the goods (in Australia, Canada, New Zealand, Norway, Poland, the United Kingdom and the United States), with some exceptions (in Argentina, Germany, Italy and Lebanon), provided that the right is actively pursued (in Argentina and Italy).

39. Although in Japan general liens may be exercised, this is not generally the case (in Argentina, Italy, Lebanon, the Netherlands, Spain and the United States) or not the case unless clearly stated in the contract of carriage (in Australia, Canada, New Zealand, Norway and the United Kingdom).

D. Obligations of shipper, intermediate holder and consignee

1. Shipper

40. The shipper is obliged to ship clearly identifiable cargo and to provide an accurate description of the goods in the transport document (in Argentina, Australia, Canada, Germany, Indonesia, Japan, the Netherlands, New Zealand, Norway, the United Kingdom and the United States). Where the shipper packages goods, the shipper is obliged to package them adequately according to their nature (in Germany); to ship dangerous goods only with the carrier's consent (in Japan and Germany the obligation is merely to notify the carrier of the dangerous goods); where applicable, to conform with any requirements as to marking and packaging of dangerous goods (in Canada); to deliver the goods to the carrier in the manner agreed in the transport document and to pay freight, unless otherwise agreed,

provided such agreement is clearly evident on the face of the transport document (in Japan).

2. Intermediate holder

41. Responses to the questionnaire did not elucidate the obligations of intermediate holders.

3. Consignee

42. The consignee is obliged to receive (in Canada, China, Hungary, Indonesia, Italy, Japan, the Netherlands, Norway, Poland, Spain, the United Kingdom and the United States) and remove (in Canada) the goods, even if they are damaged (in Argentina, Canada, the Netherlands, Poland, Spain and the United Kingdom) as long as they remain recognizable (in Canada and Poland), "retain their commercial identity" (in Australia, New Zealand and the United Kingdom) or except for "a total constructive loss" (in the United States). Receipt should be conducted in a timely (in Australia, Canada, New Zealand, Poland, the United Kingdom and the United States) and cooperative manner (in Argentina, Australia, Italy, the Netherlands, New Zealand, Norway, Poland, Spain, the United Kingdom and the United States). In the event goods are damaged beyond recognition, the consignee is obliged to provide whatever cooperation is necessary for the carrier to survey the goods (in Spain).

43. The carrier is obliged to accept instructions regarding delivery of the goods if given by an appropriate holder (in Australia, Canada, China, Japan, New Zealand, Poland, the United Kingdom and the United States) and to make delivery of the goods at the destination to the consignee (in Argentina, Australia, Canada, Indonesia, Italy, the Netherlands, New Zealand, Poland, Turkey, the United Kingdom and the United States). Where reefer units are involved, the New Zealand association also requested an additional obligation to provide (upon request) information on temperature recordings for the period the goods were in the carrier's custody.

E. Delivery and receipt of the goods at destination

44. The questions considered by the International Subcommittee included the following: under what circumstances a consignee may refuse to accept delivery of the goods; what, in those circumstances, is the proper course of conduct for the carrier to follow; and what is the appropriate procedure for delivery when the goods arrive before the transport document, as often happens in practice.

45. A carrier must deliver the goods to the person entitled to take delivery. If the carrier delivers the goods without the consignee producing the bill of lading, the carrier is liable for any losses that ensue (in Australia, Germany, the Netherlands, New Zealand, Spain, Turkey, the United Kingdom and the United States). The letter of indemnity is a separate contract indemnifying the carrier for such liability. Delivery under a letter of indemnity has no effect on the right of the person entitled to delivery to claim against the carrier (in Australia, Canada, Hungary, Japan, the Netherlands, New Zealand, Norway, Spain, Turkey, the United Kingdom and the United States).

46. Most participants at the first meeting of the International Subcommittee were in favour of a duty to be expressly laid on the consignee to accept delivery. It was also indicated that in that event it should be the carrier's duty to notify the consignee that the goods were available for delivery. In addition, it was felt that, if the consignee failed to accept delivery or no consignee appeared at the place of destination or for any other reason the carrier was not able to deliver, the contractual counterpart of the carrier was in principle financially responsible and must also provide instructions as to the disposal of the goods. It was also suggested that bills of lading should be subject to limitation periods so that after the passing of a certain period of time there would no longer be any right to claim under a bill of lading.

47. The International Subcommittee also examined the question of the appropriate course of conduct for a carrier when a consignee did not attend at the discharge port to take delivery or refused to take delivery and under what circumstances the carrier might dispose of the goods.

48. A right of disposal exists in many national systems (in Argentina, Canada, Germany, Hungary, Indonesia, Italy, Japan, the Netherlands, New Zealand, Norway and the United States). The carrier may land the goods and process them through customs (in New Zealand), and warehouse them (in Argentina, Canada, China the Democratic People's Republic of Korea, Hungary, Indonesia, Italy, Japan, the Netherlands, New Zealand, Norway, Turkey, the United Kingdom and the United States). Some national systems instead require the carrier to deposit the goods with the competent judicial authority (in Indonesia, Italy, Japan and Spain).

49. Notice is to be provided (in Germany, Hungary, Italy and Japan) immediately (in Hungary, Italy and Japan) to the consignee (in Japan) or to the consignor (in Hungary and Italy). The cost of storage attaches to the goods (in Argentina

and the United States), to the shipper (in Canada, Hungary and Japan) or the consignee (in Canada, China, the Democratic People's Republic of Korea, the Netherlands, Norway, the United Kingdom and the United States), assuming the consignee has become a party to the contract of carriage (in the Netherlands) or demands delivery or makes a claim thereunder (in Australia, New Zealand and the United Kingdom).

50. The carrier may sell or auction the goods after a certain time. The period is 60 days in China, 15 days in Hungary, 14 days in Japan, a "reasonable period" in Norway and 20 days in Spain. Goods are sold under authority of the court (in China, Indonesia, Japan and the Netherlands). The goods may be sold if the consignee's failure to cooperate is ongoing (in New Zealand) or they may be auctioned at will (in Japan).

F. Rights of disposal and the right to give instructions to the carrier

51. One of the features of transportation contracts is that the contractual counterpart to the carrier has the right to dispose of the goods. This right includes in particular the right to ask the carrier to stop the goods in transit, to change the place at which delivery is to take place and to deliver the goods to a consignee other than that indicated by the consignee in the transport document. Apart from these rights, it is recognized that the holder of such rights is also able to renegotiate new terms with the carrier, whereas it is understood that the carrier in those circumstances is free to reject or accept such changes in the contract. While international conventions in the field of maritime law (the Hague Rules and the Hamburg Rules) have not covered that issue so far, a number of instruments concerning other modes of transportation have done so and thereby provide at least a basis for possible further unification.

52. It has been suggested that the International Subcommittee should further examine the question of when the right of disposal and the right to give instructions to the carrier is effectively transferred, taking into account the type of documentary evidence of the contract of carriage used by the parties (e.g. bill of lading, a sea waybill or an electronic equivalent to either of the latter documents) and situations where no transport document has been issued. It has been also suggested that the International Subcommittee should consider which proof of identity a person should be required to produce in order to exercise the right of disposal and the right to give instructions to the carrier.

IV. Conclusion

53. The work carried out thus far by CMI in cooperation with the Secretariat has, as indicated above, focused on issues related to inspection and description of the goods in the transport document; content of the transport document; rights of the carrier; obligations of shipper, intermediate holder and consignee; delivery and receipt of the goods at destination; rights of disposal; and the right to give instructions to the carrier.

54. In the course of this work, it has been noted that, although bills of lading are still used, especially where a negotiable document is required, the actual carriage of goods by sea sometimes represents only a fragment of an international transport of goods. In the container trades, even a port-to-port bill of lading would involve receipt and delivery at some point not directly connected to the arrival of, or discharge from, the ocean vessel. Moreover, in most situations it is not possible to take delivery alongside the vessel. Furthermore, where different modes of transport are used, there are often gaps between mandatory regimes applying to the various transport modes involved. It has been proposed, therefore, that, in developing an internationally harmonized regime that covers the relationships between the parties to the contract of carriage for the full duration of the carrier's custody of the cargo, issues that arise in connection with activities that are integral to the carriage agreed to by the parties and that take place before loading and after discharge should also be considered, as well as issues that arise under shipments where more than one mode of transport is contemplated. Furthermore, while the emphasis of this work, as originally conceived, was on the review of areas of law governing the transportation of goods that had not previously been covered by international agreement, it has been increasingly felt that the present, broad-based project should be extended to include an updated liability regime that would be designed to complement the terms of the proposed harmonizing instrument.

55. It should be noted, in that connection, that similar expectations were voiced at the thirty-second session of the Commission, when interest was expressed in the announced study that went beyond the liability of carriers and that would examine the interdependence among various contracts involved in the international carriage of goods and the need to provide legal support to modern contract and transport practices. It was stated that increasing disharmony in the area of international carriage of goods was a source of concern and that, in order to provide a certain legal basis to modern

contract and transport practices, it was necessary to look beyond the liability issues and, if need be, reconsider positions taken in the past. Furthermore, it was said that various regional initiatives in the area of transport law ought to be examined and borne in mind in any future work in that area of law.[9]

56. Following the identification of issues and the preliminary discussions that took place at the first meeting of the International Subcommittee, it was agreed that a CMI working group would prepare a paper in which such issues were set out and possible solutions put forward, in some cases on an alternative basis, for discussion by the International Subcommittee.

57. The Commission may wish to take note of the progress made since its thirty-second session, when it requested the Secretariat to cooperate with CMI in gathering and analysing information on possible issues for future work on transport law. The Commission may wish to request that the Secretariat continue its cooperation with CMI with a view to presenting, at the next session of the Commission, a report identifying issues in transport law in respect of which the Commission might undertake future work and presenting the possible solutions that would have been discussed in the course of the consultations between CMI and the Secretariat, including, as appropriate, the conclusions that might be reached and suggestions that might be made at the colloquium on maritime law to be held in New York on 6 July 2000 in conjunction with the thirty-third session of the Commission.

Notes

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17).

[2] Ibid., para. 210.

[3] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 264).

[4] Ibid., para. 266.

[5] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.

[6] Ibid., para. 415.

[7] Ibid., para. 418.

[8] *CMI Yearbook 1998*, pp. 108-117.

[9] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 417.

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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Thirty-third session
New York, 12 June - 7 July 2000

INTERNATIONAL STANDBY PRACTICES (ISP98)

Report of the Secretary-General

1. At its thirty-second session in 1999, the Commission considered, on the basis of a report of the Secretary-General, [1] a request by the Director of the Institute of International Banking Law and Practice, Inc. to consider endorsing for world-wide use the new Rules on International Standby Practices (ISP98) (letter of request of 3 March 1999 is reproduced in annex I). However, owing to the fact that late publication of that report had prevented some delegations from carrying out consultations, the Commission felt obliged to postpone consideration of endorsement until the thirty-third session in 2000.

2. The official text of ISP98 in English, which has been endorsed by the International Chamber of Commerce (ICC) and issued as ICC publication No. 590, is reproduced in annex IV. Translations into Chinese, French, Russian or Spanish are reproduced in annex IV of the respective language versions of this note. Translations into Bulgarian, Hebrew, Korean and Turkish have been prepared and published. Translations into German, Italian, Japanese and Thai are currently being prepared.

3. As stated on the cover of that publication,

> "ISP98 fills an important gap in the market place. Though standby letters of credit have similarities with commercial letters of credit and other financial instruments, there are significant differences in scope and practice. Moreover, it is recognized that the ICC's Uniform Customs and Practice for Documentary Credits (UCP), which is internationally

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1/ A/CN.9/459. The present note largely reproduces A/CN.9/459, since at the thirty-second session of the Commission only the English and the French versions of ISP98 were available.

accepted for commercial letters of credit, is not appropriate for all forms of standbys. A new set of Rules was required for this workhorse of commerce and finance, which, in terms of value, exceeds commercial credits by a ratio of 5:1.

> ISP98 reflects a distillation of practices from a wide range of standby users - bankers, merchants, rating agencies, corporate treasurers, credit managers, government officials and banking regulators. Like the UCP for commercial credits, ISP98 is destined to become the standard for the use of standbys in international transactions."

4. By way of general background, it may be noted that the subject of documentary credits and bank guarantees has been a topic in which the Commission has taken an interest since the time of its inception. The Commission endorsed the 1962 version of the Uniform Customs and Practice for Documentary Credits (UCP) at its second session in 1969, [2] the 1974 version at its eighth session in 1975, [3] the 1983 version at its seventeenth session in 1984 [4] and the 1993 version at its twenty-seventh session in 1994. [5]

5. In view of the close link between ISP98 and the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the Secretary of the Commission participated in the preparation of ISP98 so as to ensure consistency between these two supplementary texts. His prologue to the ICC publication is reproduced in annex III. Additional information on the reasons for the preparation of ISP98 and about its salient features may be deduced from the preface contained in annex II.

2/ Report of the United Nations Commission on International Trade Law on the work of its second session, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 95.

3/ Report of the United Nations Commission on International Trade Law on the work of its eighth session, Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 41.

4/ Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 129.

5/ Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 230.

ANNEX I

Letter of Professor James E. Byrne, Director of the
Institute of International Banking Law and Practice, Inc

I am writing to request endorsement of the International Standby Practices (ISP98) by the United Nations Commission on International Trade Law.

These private rules of practice are intended to apply to standby letters of credit. The idea to prepare such rules was conceived during the deliberations of the UNCITRAL Working Group on International Contract Practices which resulted in the United Nations Convention on Independent Guarantees and Standby Letters of Credit ("the Convention"). These rules were deliberately formulated to complement the Convention whose use is recommended in their Official Preface. The ISP98 drafting process itself was undertaken in regular consultation with the UNCITRAL Secretariat and the Institute has used occasions to promote ISP98 as an opportunity also to promote adoption of the Convention.

ISP98 became effective 1 January 1999. It has been endorsed by the International Financial Services Association and the ICC Commission on Banking Technique and Practice, and issued as ICC publication No. 590. It is currently being used and promoted by major banks which issue standby letters of credit, and is expected to become the world standard within the next few years.

Because of the close links between ISP98 and the Convention, and due to UNCITRAL's past practice of endorsing similar rules of practice, such as UCP500 and Incoterms1990, the Institute formally requests that the Commission consider endorsement of ISP98.

ANNEX II

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Approved by the International Financial Services Association and the ICC Banking Commission

PREFACE

The International Standby Practices (ISP98) reflects generally accepted practice, custom, and usage of standby letters of credit. It provides separate rules for standby letters of credit in the same sense that the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Demand Guarantees (URDG) do for commercial letters of credit and independent bank guarantees.

The formulation of standby letter of credit practices in separate rules evidences the maturity and importance of this financial product. The amounts outstanding of standbys greatly exceed the outstanding amounts of commercial letters of credit. While the standby is associated with the United States where it originated and where it is most widely used, it is truly an international product. Non-U.S. bank outstandings have exceeded those of U.S. banks in the United States alone. Moreover, the standby is used increasingly throughout the world.

Standbys are issued to support payment, when due or after default, of obligations based on money loaned or advanced, or upon the occurrence or non-occurrence of another contingency.

For convenience, standbys are commonly classified descriptively (and without operative significance in the application of these Rules) based on their function in the underlying transaction or other factors not necessarily related to the terms and conditions of the standby itself. For example:

A "Performance Standby" supports an obligation to perform other than to pay money, including for the purpose of covering losses arising from a default of the applicant in completion of the underlying transactions.

An "Advance Payment Standby" supports an obligation to account for an advance payment made by the beneficiary to the applicant.

A "Bid Bond/Tender Bond Standby" supports an obligation of the applicant to execute a contract if the applicant is awarded a bid.

A "Counter Standby" supports the issuance of a separate standby or other undertaking by the beneficiary of the counter standby.

A "Financial Standby" supports an obligation to pay money, including any instrument evidencing an obligation to repay borrowed money.

A "Direct Pay" Standby supports payment when due of an underlying payment obligation typically in connection with a financial standby without regard to a default.

An "Insurance Standby" supports an insurance or reinsurance obligation of the applicant.

A "Commercial Standby" supports the obligations of an applicant to pay for goods or services in the event of non-payment by other methods.

In the past, many standbys have been issued subject to the UCP even though it was intended for commercial letters of credit. The UCP reinforced the independence and documentary character of the standby. It also provided standards for examination and notice of dishonor and a basis to resist market pressures to embrace troublesome practices such as the issuance of standbys without expiration dates.

Despite these important contributions, it has long been apparent that the UCP was not fully applicable nor appropriate for standbys, as is recognized in UCP 500 Article 1 which provides that it applies "to the extent to which they may be applicable." Even the least complex standbys (those calling for presentation of a draft only) pose problems not addressed by the UCP. More complex standbys (those involving longer terms or automatic extensions, transfer on demand, requests that the beneficiary issue its own undertaking to another, and the like) require more specialized rules of practice. The ISP fills these needs.

The ISP differs from the UCP in style and approach because it must receive acceptance not only from bankers and merchants, but also from a broader range of those actively involved in standby law and practice---corporate treasurers and credit managers, rating agencies, government agencies and regulators, and indenture trustees as well as their counsel. Because standbys are often intended to be available in the event of disputes or applicant insolvency, their texts are subject to a degree of scrutiny not encountered in the commercial letter of credit context. As a result, the ISP is also written to provide guidance to lawyers and judges in the interpretation of standby practice.

Differences in substance result either from different practices, different problems, or the need for more precision. In addition, the ISP proposes basic definitions should the standby permit or require presentation of documents by electronic means. Since standbys infrequently require presentation of negotiable documents, standby practice is currently more conducive to electronic presentations, and the ISP provides definitions and rules encouraging such presentations. The development of S.W.I.F.T. message types for the ISP is anticipated.

The ISP, like the UCP for commercial letters of credit, simplifies, standardizes, and streamlines the drafting of standbys, and provides clear and widely accepted answers to common problems. There are basic similarities with the UCP because standby and commercial practices are fundamentally the same. Even where the rules overlap, however, the ISP is more precise, stating the intent implied in the UCP rule, in order to make the standby more dependable when a drawing or honor is questioned.

Like the UCP and the URDG, the ISP will apply to any independent undertaking issued subject to it. This approach avoids the impractical and often impossible task of identifying and distinguishing standbys from independent guarantees and, in many cases, commercial letters of credit. The choice of which set of

rules to select is, therefore, left to the parties--as it should be. One may well choose to use the ISP for certain types of standbys, the UCP for others, and the URDG for still others. While the ISP is not intended to be used for dependent undertakings such as accessory guarantees and insurance contracts, it may be useful in some situations in indicating that a particular undertaking which might otherwise be treated as dependent under local law is intended to be independent.

For the ISP to apply to a standby, an undertaking should be made subject to these Rules by including language such as (but not limited to):

This undertaking is issued subject to the International Standby Practices 1998.

or

Subject to ISP98.

Although the ISP can be varied by the text of a standby, it provides neutral rules acceptable in the majority of situations and a useful starting point for negotiations in other situations. It will save parties (including banks that issue, confirm, or are beneficiaries of standbys) considerable time and expense in negotiating and drafting standby terms.

The ISP is designed to be compatible with the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (which represents a useful and practical formulation of basic standby and independent guarantee law) and also with local law, whether statutory or judicial, and to embody standby letter of credit practice under that law. If these rules conflict with mandatory law on issues such as assignment of proceeds or transfer by operation of law, applicable law will, of course, control. Nonetheless, most of these issues are rarely addressed by local law and progressive commercial law will often look to the practice as recorded in the ISP for guidance in such situations, especially with respect to cross border undertakings. As a result, it is expected that the ISP will complement local law rather than conflict with it.

The ISP is intended to be used also in arbitration as well as judicial proceedings (such as the expert based letter of credit arbitration system developed by the International Center for Letter of Credit Arbitration (ICLOCA) Rules or general commercial ICC arbitration) or with alternative methods of dispute resolution. Such a choice should be made expressly and with appropriate detail. At a minimum, it can be made in connection with the clause relating to ISP98 - e.g. This undertaking is issued subject to ISP98, and all disputes arising out of it or related to it are subject to arbitration under ICLOCA Rules (1996).

Although translations of the ISP into other languages are envisioned and will be monitored for integrity, the English text is the official text of the ISP in the event of disputes.

The ISP is the product of the work of the ISP Working Group under the auspices of the Institute of International Banking Law & Practice, Inc. which interacted with hundreds of persons over a five year period, and has benefitted from comments received from individuals, banks, and national and international associations. In particular, the participation of the International Financial Services Association (formerly

the USCIB) and the Ad Hoc Working Group under the chairmanship of Gary Collyer (which led to its endorsement by the ICC Banking Commission) is gratefully recognized. In addition, the sponsorship and support of Citibank N.A., The Chase Manhattan Bank, ABN-AMRO, Baker & McKenzie, and the National Law Center for Inter-American Free Trade is acknowledged. Perhaps the greatest significance of the ISP is that its creation marks a new chapter in the collaboration between the international banking operations community and the legal community at an international level. In this respect, the active role played in this process by the Secretariat of the United Nations Commission on International Trade Law has been invaluable.

The ISP is drafted as a set of rules intended for use in daily practice. It is not intended to provide introductory information on standbys and their uses. While it is recognized that specific rules would benefit from explanatory comments, such comments are not appended to the ISP because the resulting work would be too cumbersome for daily use. Instead, introductory materials and Official Comments are available in the *Official Commentary on the International Standby Practices (ISP98)*. For further information on support materials and developments on the ISP and to pose queries, consult the ISP98 website: www.ISP98.com.

To address inevitable questions, to provide for official interpretation of the rules, and to assure their proper evolution, the Institute of International Banking Law & Practice, Inc. has created a Council on International Standby Practices which is representative of the several constituencies which have contributed to the ISP and has charged it with the task of maintaining the integrity of the ISP in cooperation with the Institute, the ICC Banking Commission, the IFSA, and various supporting organizations.

James G. Barnes
Baker & McKenzie
Vice Chair
ISP Working Group

Professor James E. Byrne
Director,
Institute of International Banking
Law & Practice, Inc.
Chair & Reporter
ISP Working Group

Gary W. Collyer
Chair, ICC Ad Hoc Working Group &
Technical Adviser to the
ICC Banking Commission

ANNEX III

PROLOGUE

by Gerold Herrmann, Secretary
United Nations Commission on International Trade Law (UNCITRAL)

It was an extremely interesting and enriching experience for me to assist in drafting ISP98. This participation allowed me to witness (and now bear witness to) the very thorough and pragmatic drafting process in a superbly selected group, with representatives of all interested sectors actively involved in standby letter of credit practice such as: bankers, especially those responsible for letter of credit operations and global trade transactions, bank counsel, attorneys, academics, regulators, government officials, corporate treasurers, and likely influential beneficiaries. The treasure trove of experience and expertise and the diversity of interests and perspectives proved invaluable in determining--as was continuously done by examining concrete practical examples--whether on a given issue an operational rule would be desirable and useful and, if so, which solution would work best and reflect good practice.

Continued participation in the preparatory work has also convinced me--as, I am sure, it would have anyone else--of the special characteristics of standbys at the operational level of practical detail and usage. Their special features, in my view, not only justify but also necessitate special contractual rules designed for standbys. As the constant comparison with the UCP clearly revealed, quite a few UCP Articles are inappropriate for standbys and quite a few issues of paramount importance in standby practice are not addressed at all in the UCP. While a similar disparity in practice exists between the standby and the independent guarantee (the bank or demand guarantee European style), this seems particularly, if not exclusively, true for those types of actual use (e.g. financial standby, direct-pay standby) hitherto found only extremely rarely in guarantee practice. For this and other reasons, including firmness of the undertaking, I would not be surprised to see not only standbys but also some demand guarantees issued subject to ISP98.

For a professional unifier of law, participation in the preparatory work was particularly satisfying because of its interconnection with other harmonisation and reform efforts. In addition to the concordance with revised Article 5 UCC (the letter-of-credit law of the homeland of the standby) and the similarly close contact (and personal overlap) with the 1993 UCP revision task force, I am referring in particular to UNCITRALs work which culminated in the adoption in 1995 by the General Assembly of the "United Nations Convention on Independent Guarantees and Stand-by Letters of Credit." The idea of preparing special operational rules for standbys was born during the extensive debates comparing national laws as well as the two instruments to be married by that Convention. Since bride and groom were presented there in all facets and critically scrutinized by their future in-laws, UNCITRALs *travaux preparatoires* make for highly informative reading (as will future abstracts of court decisions to be published in UNCITRAL's case collection system called CLOUT; homepage: www.un.or.at/uncitral). It was gratifying to see the group preparing ISP98 refer continuously to the UNCITRAL Convention in order to ensure complete consistency. I must admit to special gratification by overhearing one of the world's leading letter of credit expert's remark to his banking colleague: "The more I look at this UN Convention, the more I really like it."

The above coordination or cooperation in the universal harmonisation and modernization efforts is welcome and in fact crucial because of the (often neglected or ignored) interdependence between the two very different levels of legal norms: the contractual level, where such sets of rules like ISP98, UCP 500, or URDG become effective by agreement of the individual parties, and the statutory level, where internationally elaborated law like the UN Convention or domestic law (e.g. Art. 5 UCC) recognise and give full effect to the exercise of that party autonomy and regulate certain issues that can effectively be settled only at that level (e.g. standards of fraud exception, injunctive relief and other court matters). Therefore, ISP98 and the Convention supplement each other in an ideal manner and together lay the necessary basis for a smooth functioning of standby practice worldwide.

ANNEX IV

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New York, 12 June - 7 July 2000

UNIFORM RULES FOR CONTRACT BONDS (URCB)

Report of the Secretary-General

1. At its thirty-second session in 1999, the Commission considered, on the basis of a report of the Secretary-General, [1] a request by the Secretary-General of the International Chamber of Commerce (ICC) to endorse the Uniform Rules for Contract Bonds (URCB) (letter of request of 27 April 1999 is reproduced in annex I). However, owing to the fact that late publication of that report had prevented some delegations from carrying out consultations, the Commission felt obliged to postpone consideration of endorsement until the thirty-third session in 2000.

2. The original text of the URCB in English, which has been issued by the ICC as publication no. 524, is reproduced in annex III. Translations into French and Spanish, prepared by the ICC, are reproduced in annex III to the respective language versions of this document. Translations into Bulgarian, Finnish, Icelandic, Korean, Italian, Japanese and Portuguese have also been prepared and published by the ICC.

3. With regard to the reasons that led to the preparation of the URCB, the Foreword to the URCB states:

> "Due to a need in the insurance industry for a uniform set of rules applicable internationally to contract bonds creating obligations of an accessory nature, the ICC Commission of Insurance undertook to elaborate the ICC Uniform Rules for Contract Bonds."

4. For further background information on the URCB, the introduction and general remarks from the ICC publication are set out in annex II.

1/ A/CN.9/459/Add.1. The present note largely reproduces A/CN.9/459/Add.1, since at the thirty-second session of the Commission only the English and the French versions of URCB were available.

ANNEX I

Letter of Ms Maria Livanos Cattaui, Secretary General of the
International Chamber of Commerce

As you may be aware, several years ago ICC published a set of Uniform Rules for Contract Bonds (URCB). I write to ask that UNCITRAL give its formal recognition and endorsement to these rules. ICC is seeking similar endorsements from the World Bank, EU and Inter-American Development Bank.

The URCB deal with Conditional Guarantees, so-called accessory bonds, which relate directly to the underlying contract that is being guaranteed for performance purposes.

Today, the URCB exist in several languages (including English, Spanish, French, Italian, Icelandic, Japanese, Chinese and Korean). The Government of Japan, the International Federation of Consulting Engineers (FIDIC), the Institution of Electrical Engineers (IEE), the International Credit Insurance Association (ICIA), the Association of International French Contractors (SEFI), and the Panamerican Surety Association (PASA), among others, have adopted the URCB as a recommended standard for bonds issued by their members.

The use of URCB as a global framework for bonds will provide the desired uniformity in the domain of security forms, and thus help to promote international trade. We firmly believe that this new model form will be of benefit to the entire business community. Its recognition by public institutions will assist private contracting and facilitate the export and freedom of contracting worldwide.

ANNEX II

ICC UNIFORM RULES FOR CONTRACT BONDS

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INTRODUCTION

These Uniform Rules have been drawn up by an ICC Working Party of members representing the Commission on Insurance and the building and engineering industry for worldwide application in relation to Contract Bonds, being those bonds creating obligations of an accessory nature, where the liability of the Surety or Guarantor arises and is conditional upon an established default on the part of a Contractor (defined in these Rules as the Principal) under the Contract which is the subject matter of the relevant Bond. The Rules set out below will therefore apply where the intention of the parties is that the obligations of the Guarantor will depend upon the duties or liabilities of the Principal under the relevant Contract.

Bonds governed by the ICC Rules set out below are intended to operate so as to confer upon the Beneficiary in each instance security for the performance or execution of contract obligations or payment of any sums which may fall due to the Beneficiary as a result of any breach of obligation or default by the Principal under the Contract. The Bond is intended to ensure that, subject to its financial limits, either the obligations set out in the Contract will be performed or executed, or that upon default, the Beneficiary will recover any sum properly due notwithstanding the insolvency of the Principal or the Principal's failure for any other reason to satisfy or discharge its liability. Accordingly, where a Bond governed by these Rules is in force, the Beneficiary will have the additional assurance of the Guarantor's accessory obligations to ensure that the judgment or award of any competent court or arbitral tribunal is satisfied.

The relationship of the parties under a Bond governed by these Rules number 524 differs from that arising under the ICC Uniform Rules for Demand Guarantees number 458 (the Demand Rules). Where the intention is that the Beneficiary is to obtain security for the obligations of the Principal arising pursuant to the Contract but that the Guarantor's liability shall only arise in case of an established default under that Contract, these Rules should be selected.

General

These Rules are intended to provide a clear and concise scheme to regulate the nature of obligations arising under Bonds and claims procedure. Because the nature of a Bond regulated by these Rules is that the obligations of the parties are related directly to and depend upon the obligations of the parties arising under the Contract, the Rules do not contain detailed provisions dealing with documentary requirements or the problem of unfair calling. In the event of a dispute arising as to the liability of a Guarantor, the Rules contemplate that such dispute will be determined by reference to the Contract. The Guarantor and the

Principal are protected in that liability will arise only where default is established. The Beneficiary is protected by the assurance that any judgment or award will be discharged by the Guarantor if the Principal fails to do so.

The Uniform Rules for Contract Bonds number 524 set out below shall apply where expressly incorporated by the parties in accordance with their detailed provisions. These new Rules depend for their success upon their use by the international business community. The ICC recommends the use of these new Rules which will help to secure uniformity of practice in the operation and enforcement of Bonds.

ANNEX III

ICC UNIFORM RULES FOR CONTRACT BONDS

issued as ICC publication No. 524,
adopted by the ICC Executive Board on 23 April 1993,
come into effect on 1 January 1994

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ICC INCOTERMS 2000

Report of the Secretary-General

1. By letter of 28 February 2000 (reproduced in annex I), the Secretary-General of the International Chamber of Commerce (ICC) requested the Commission to consider endorsing Incoterms 2000 for world-wide use. This report gives the background to the previous actions of the Commission in respect of Incoterms 1953 and Incoterms 1990 and a short summary of the reasons for the preparation of the current revision. The original English text of Incoterms 2000 is reproduced in annex II to this document. Translations into Arabic, Chinese, French, Spanish or Russian are reproduced in annex II to the respective language versions of this document.

2. At the Commission's first session in 1968, in deciding on its programme of work, the Commission identified Incoterms 1953 as an international instrument of special importance with regard to the harmonization and unification of the law of the international sale of goods. 1/ At its second session in 1969, with a view to encouraging the world-wide use of Incoterms 1953, the Commission, requested the Secretary-General to inform the ICC that Incoterms 1953 should be given the widest possible dissemination and to bring the views of the Commission to the attention of the United Nations regional economic commissions. 2/

3. Amendments to Incoterms were made and additional terms were added in 1976 and 1980. However, those changes in Incoterms were not officially brought to the attention of the Commission and the

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1/ Report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 48.

2/ Report of the United Nations Commission on International Trade Law on the work of its second session, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 16 (A/7218), para. 60.

Commission took no action leading towards endorsing the revision. By the late 1980's ICC decided to completely revise Incoterms 1953 in order to adapt them to contemporary commercial practice. Incoterms 1990 was adopted by the ICC with a date of entry into force on 1 July 1990 and became available as ICC publication no. 460.

4. At its twenty-fifth session in 1992, the Commission considered a request of the Acting Secretary-General of the ICC to endorse Incoterms 1990 for world-wide use. At that session, the Commission was agreed that Incoterms 1990 succeeded in providing a modern set of international rules for the interpretation of the most commonly used trade terms in international trade and took the following decision endorsing Incoterms 1990:

> "The United Nations Commission on International Trade Law,
>
> Expressing its appreciation to the International Chamber of Commerce for having transmitted to it the revised text of Incoterms, which was approved by the Commercial Practices Commission of the International Chamber of Commerce and entered into force on 1 July 1990, and for requesting the Commission to consider endorsing Incoterms 1990 for worldwide use,
>
> Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by revising Inocterms to take account of changes in transportation techniques and to adapt the terms to the increasing use of electronic data interchange,
>
> Noting that Incoterms constitute a valuable contribution to the facilitation of international trade,
>
> Commends the use of Incoterms 1990 in international sales transactions." 3/

5. With regard to the reasons for the preparation of Incoterms 2000, the Foreword to Incoterms 2000 states:

> "Since the creation of Incoterms by ICC in 1936, this undisputed world-wide contractual standard has been regularly updated to keep pace with the development of international trade. Incoterms 2000 take account of the recent spread of customs-free zones, the increased use of electronic communications in business transactions, and changes in transport practices. Incoterms 2000 offer a simpler and clearer presentation of the 13 definitions, all of which have been revised."

6. Incoterms 2000 has been adopted by the ICC with a date of entry into force on 1 January 2000. It is available from ICC as publication no. 560.

ANNEX I

3/ Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, Official Records of the General Assembly, Forty-seventh Session, (Supplement No.17(A/47/17), paras. 160 and 161.

Letter of Ms Maria Livanos Cattaui, Secretary General of the
International Chamber of Commerce

I am writing to request endorsement of Incoterms 2000 - the ICC official rules for the interpretation of trade terms – by the United Nations Commission on International Trade Law.

Incoterms 2000 have been released in September 1999 under ICC publication reference number 560 and have entered into force on 1 January 2000.

Incoterms 2000 are already used in countless commercial sales contracts. Incoterms are contractual terms, the incorporation of which in sales contracts usefully complements the provisions of the United Nations Convention on Contracts for the International Sale of Goods and reduces the risk of misunderstanding that could lead to legal complications.

This text of Incoterms 2000 is the result of a very comprehensive consultation process – in fact, Incoterms 2000 are based on the largest survey among business ever conducted in the history of Incoterms. We are therefore confident that the 13 new Incoterms reflect common commercial practice and respond to a business need for a global standard for the interpretation of trade terms.

Although the only authoritative text of Incoterms 2000 is the English one, ICC has decided to submit Incoterms 2000 to UNCITRAL in the six UN official languages. Please note, however, that in case of discrepancies between the various texts, only the English text should be considered as original, all other texts being translations.

ICC trusts that UNCITRAL will appreciate the effort made by ICC to facilitate international trade and to involve all interested parties in the dissemination of legal rules that have proven to reflect the needs of modern commercial transactions. As such, we hope that UNCITRAL will respond favourably to this formal request for endorsement of Incoterms 2000.

Therefore, as with the previous version of this authoritative legal standard, ICC would like to request formal endorsement of Incoterms by UNCITRAL.

ANNEX II

ICC INCOTERMS 2000

Entry into force 1 January 2000

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